92-1570

No. 92-___

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

FARMERS INSURANCE GROUP, doing business as Truck Insurance Exchange, doing business as Truck Underwriters Association,

Petitioner,

vs.

HAROLD MASSEY and DOROTHY MASSEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Whether the Oklahoma standards for awarding and reviewing punitive damages applicable to this diversity case, standards which neither require a court to consider the ratio of compensatory damages to punitive damages nor contain "detailed substantive standards" for post-verdict review of punitive damage awards, violate the due process standards set by this Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032 (1991). A similar issue is curently before this Court in *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W. Va. 1992), *cert. granted*, 61 U.S.L.W. 3206 (U.S. Nov. 30, 1992) (No. 92-749).

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were Petitioner Farmer's Insurance Group (doing business as Truck Insurance Exchange and doing business as Truck Underwriters Association) and Respondents Harold Massey and Dorothy Massey.

Petitioner Farmers Insurance Group lists the following parent companies and subsidiaries (except wholly-owned subsidiaries):

1. B.A.T. Industries (p.l.c.)
2. F.I.G. Holding Co.
3. Farmers Ins. Co. of Idaho
4. Farmers Ins. Co. of Arizona
5. Farmers Ins. Co., Inc.
6. Farmers Ins. Co. of Oregon
7. Farmers Underwriters Association
8. Farmers Group, Inc.
9. Farmers Ins. Co. of Washington
10. Farmers Insurance Exchange
11. Farmers Texas County Mutual
12. FIG Leasing Co., Inc.
13. Fire Insurance Exchange
14. Prematic Service Corp.
15. South Western Nominees Ltd.
16. Texas Farmers Insurance Co.
17. Truck Insurance Exchange
18. Truck Underwriters Association

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No. 92-___

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Petitioner,

vs.

HAROLD MASSEY and DOROTHY MASSEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Farmers Insurance Group, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Tenth Circuit, entered February 9, 1993, and order denying the Petition for Rehearing and Suggestion for Rehearing En Banc, entered March 16, 1993.

OPINIONS BELOW

The judgment and order of the Court of Appeals for the Tenth Circuit is unreported, and is reprinted in the

appendix hereto, page 1a, *infra*. The order of the Court of Appeals for the Tenth Circuit denying the Petition for Rehearing and Suggestion for Rehearing En Banc is unreported, and is reprinted in the appendix hereto, page 33a, *infra*.

JURISDICTION

The jurisdiction of the district court was invoked under 28 United States Code section 1332 based on diversity of citizenship. The United States Court of Appeals had jurisdiction over the case pursuant to 28 United States Code section 1291. The judgment and order of the United States Court of Appeals for the Tenth Circuit was entered February 9, 1993. The order of the Court of Appeals denying the timely Petition for Rehearing and Suggestion for Rehearing En Banc was entered March 16, 1993. The jurisdiction of this Court is invoked under 28 United States Code section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the Fifth Amendment of the United States Constitution.[1] The Fifth Amendment provides in part that no person shall "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

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[1] A challenge brought in *federal* court to a state's standards for awarding and reviewing punitive damages should be analyzed under the Due Process Clause of the Fifth Amendment, not the Fourteenth Amendment. *See Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1411 n.1 (4th Cir. 1992) (en banc).

RECITATION PURSUANT TO SUPREME COURT RULE 29.4

Since the proceeding draws into question the constitutionality of Okla. Stat. Ann. tit. 23, § 9 (West 1993), it is noted that 28 U.S.C. § 2403(b) may be applicable. To our knowledge, no court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(b), certified to the state attorney general the fact that the constitutionality of a statute of that State was drawn into question.

STATEMENT OF THE CASE

Respondents purchased an insurance policy from Petitioner. Following a coverage dispute, Respondents brought this diversity case in the Federal District Court for the Eastern District of Oklahoma. The underlying facts of the dispute appear in the Court of Appeals judgment and order and need not be restated here. *See* App.[2] 1a-5a. A jury awarded Respondents total compensatory damages of $390,000 and punitive damages of $4,000,000. This Petition concerns only the constitutional deficiencies in the applicable Oklahoma standards for assessing and reviewing the punitive damage award in this diversity case.

In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S. Ct. 1032 (1991), this Court set out due process requirements for reviewing punitive damage awards. The Court is currently revisiting this issue in *TXO Production Corp. v. Alliance Resources Corp*, 419 S.E.2d 870 (W. Va. 1992), *cert.*

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[2] The Appendix to this Petition will be referred to as "App."

granted, 61 U.S.L.W. 3206 (U.S. Nov. 30, 1992) (No. 92-749).[3]

In its unpublished Order and Judgment filed February 9, 1993, the Court of Appeals recognized that, under *Haslip*, the "due process clause may provide some limits on awarding punitive damages." App at 28a n.9. The Court of Appeals failed to consider the issue, however, because it held "[d]efendant's argument is limited to an Eighth Amendment challenge." *Id.*[4] The Petition for

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[3] The *Wall Street Journal* recently commented on lower courts' confusion regarding the *Haslip* opinion. *See* Paul M. Barrett, *High Court Vagueness on Punitive Damages Leads to Legal Chaos*, WALL ST. J., Mar. 24, 1993 at A1.

[4] In the district court, Petitioner objected that imposition of punitive damages violated "the defendant's 4th, 5th, 6th, 8th and 14th Amendments, the rights thereunder." Reporter's Transcript ("R.T.") at 1248; *see also* R.T. at 1421-22 (Farmers "would object to the allowance of punitive damages against this defendant because it would be in violation of the 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution"). Subsequently, Petitioner filed its opening brief in the Tenth Circuit when the constitutionality of punitive damages was in tremendous flux. That brief, written in 1988, noted this Court in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 816 (1986) had recognized constitutional challenges to punitive damages based upon the Contracts Clause of Article 1, section 10, the Eighth Amendment's prohibition against excessive fines, and the Due Process Clause of the Fourteenth Amendment *all* " 'raise important issues which, in an appropriate setting, must be resolved.' " Brief in Chief of Appellant at 45-46, quoting *Aetna*. The brief then went on to argue punitive damages violate the Excessive Fines Clause of the Eighth Amendment, *id.*, an argument since foreclosed by this Court in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989). This Court decided *Haslip* on March 4, 1991, *after* completion of briefing and oral argument before the Court of Appeals in this case.

Rehearing and Suggestion for Rehearing En Banc directly asked the Court of Appeals to address the due process problems with the Oklahoma punitive damage standards applicable in the case. *See* Petition for Rehearing and Suggestion for Rehearing En Banc filed in the United States Court of Appeals for the Tenth Circuit ("Ptn. for Rehearing") at 2 ("In light of *Haslip* and *TXO*, this Court should grant this Petition to consider serious due process violations that occurred here"). The Court of Appeals denied the petition without comment on March 16, 1993. *See* App. at 34a. The question whether Oklahoma punitive damage standards violate due process is properly before this Court.[5]

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[5] It is sufficient for the purpose of preserving an issue for this Court's review of a *federal* court decision that the issue was raised in the Petition for Rehearing. The Court of Appeals need not have addressed the issue, because this Court's rules require that an issue be *either* pressed *or* passed upon below. *See United States v. Williams*, __ U.S. ___, 112 S. Ct. 1735, 1738-39 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.' [Citation.] . . . [T]his rule operates (as it is phrased) in the disjunctive"); *id.* at 1739 n.2 ("there is much to be said for a rule (to which this Court has never adhered) limiting review to questions pressed by the litigants below"). In *United States v. Lovasco*, 431 U.S. 783, 788 footnote 7 (1977), this Court failed to consider an argument raised in a petition for certiorari, where it was never raised in the District Court or the Court of Appeals. This Court noted Petitioner failed to use its opportunity to raise the issue in its petition for rehearing in the Court of Appeals. *Id.* In the case at bar, the due process issue was raised in both the district court, R.T. 1248, 1421-22, and in the Court of Appeals in the Petition for Rehearing and Suggestion for Rehearing En Banc. *See* Ptn. for Rehearing at 2, 3.

REASONS FOR GRANTING THE PETITION

OKLAHOMA'S STANDARDS FOR REVIEWING PUNITIVE DAMAGE AWARDS, APPLICABLE IN THIS DIVERSITY CASE, VIOLATE A DEFENDANT'S DUE PROCESS RIGHTS UNDER *HASLIP* AND PERHAPS *TXO*.

A. Introduction.

Oklahoma's standards for post-verdict review of punitive damage awards, applicable in this diversity case,[6] "jar one's constitutional sensibilities" after *Haslip*.

This Court applies a different standard to cases coming from *state* courts. For jurisdictional or prudential reasons, this Court will not consider federal questions raised for the first time in a petition for rehearing to a *state* high court, unless the state court actually entertains the question and decides it. *Herndon v. Georgia*, 295 U.S. 441, 443 (1935). *See also United States v. Williams*, 112 S. Ct. at 1740 n.5 ("When certiorari is sought to a state court, 'due regard for the appropriate relationship of this Court to state courts,' [citation], may suggest greater restraint in applying our 'pressed or passed upon' rule."); ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 3.21(c), at 155-56 (6th ed. 1986).

[6] In *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1560-61 (10th Cir. 1991), *cert. denied*, 112 S. Ct. 1194 (1992), the Court of Appeals for the Tenth Circuit held it could not reverse a punitive damage award unless it found under *Kansas* law that the award was the result of the jury's "passion and prejudice." *Id.* at 1561. *See also Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1177-78 (10th Cir. 1983) (en banc), *cert denied*, 464 U.S. 824 (1983) (applying Colorado law). Following *Mason*, the Tenth Circuit would have applied Oklahoma's constitutionally deficient "passion, prejudice or improper sympathy" test to review the award here.

The Court of Appeals for the Fourth Circuit has taken a different view of the role in federal court of a state's standards for post-verdict review of punitive damage awards. In *Johnson v. Hugo's Skateway*, 974 F.2d at 1416-17, the court held that the

Haslip, 111 S. Ct. at 1043. In light of *Haslip* and *TXO*, this Court should grant this Petition to consider serious due process violations that occurred here. The $4 million punitive damage award should elicit concern about "punitive damages that 'run wild.' " *Haslip*, 111 S. Ct. at 1043.

B. *Haslip* Held Punitive Damage Awards May Violate A Defendant's Due Process Rights.

In *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. at page 1043, this Court said it is possible for a punitive damage award to violate due process and that "general concerns of reasonableness and adequate guidance from the court when the case is tried to a jury properly enter into the constitutional calculus." *Id.*

Seventh Amendment right to a jury trial in federal courts requires that the *jury* in a federal diversity case, as the *sole* factfinder, be instructed to award punitive damages based upon the state's *post-verdict* standards. In the Fourth Circuit's view, neither the trial court nor the Court of Appeals applies the state's post-verdict review standards. *Id.* at 1416 n.9. One court commented about this "curious" argument that "[e]ssentially, it asserts that the Seventh Amendment requires a form of post-verdict review that violates the Fourteenth Amendment, or maybe it's the Fifth." *Benny M. Estes & Assocs. v. Time Ins. Co.*, 980 F.2d 1228, 1235 (8th Cir. 1992). The Eighth Circuit recently granted an en banc rehearing in a case where the issue was raised. *See Robertson Oil Co. v. Phillips Petroleum Co.*, 979 F.2d 1301 (8th Cir. 1992) (opinion withdrawn and case taken en banc).

This confusion over the proper interplay of state and federal law presents another reason for this Court to grant the Petition.

The punitive award in *Haslip* was $840,000 and the compensatory award was $200,000, which included out-of-pocket expenses of less than $4,000. *Id.* at 1037 n.2. This Court noted it was aware "the punitive damages award in this case is more than 4 times the amount of compensatory damages, [and] is more than 200 times the out-of-pocket expenses of respondent Haslip." *Id.* at 1046.

> While the monetary comparisons are wide and, indeed, *may be close to the line*, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety.

Id. (emphasis added).

In upholding the punitive award, this Court emphasized that *three layers of safeguards* provided by Alabama's scheme for imposing punitive damages were vital to its decision. *Haslip*, 111 S. Ct. at 1046. Under Alabama's system, these safeguards were provided through jury instructions, post-verdict review conducted by the trial court on the record applying specific criteria, and appellate review, also applying specific criteria. *Id.* at 1044-46. In analyzing Alabama's scheme, the Court recognized the ratio between punitive and compensatory damages as a key factor. *Id.*

Any constitutional analysis following *Haslip* must compare the safeguards available to the defendant in *Haslip* with the safeguards available to the defendant under applicable state law. As will be shown below, comparing Oklahoma's standards for post-verdict review to Alabama's standards is like comparing night to day.

Oklahoma's standards, applicable to federal courts sitting in diversity, are blatantly unconstitutional.

C. Oklahoma's Minimal Post-Verdict Appellate Review Unquestionably Violates The Due Process Standards Set Out In *Haslip*.

In *Haslip*, this Court contrasted Alabama's "detailed substantive standards" for appellate review of punitive awards, *Haslip*, 111 S. Ct. at 1045, with the Vermont and Mississippi schemes "about which Justices [had previously] expressed concern." *See Haslip*, 111 S. Ct. at 1045 n.10. Under Alabama law, the Alabama Supreme Court conducts its own independent review "to ensure that the [punitive damage] award does 'not exceed an amount that will accomplish society's goals of punishment and deterrence.' " *Haslip*, 111 S. Ct. at 1045, quoting *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989). The Alabama high court considers:

> (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these

> to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Haslip, 111 S. Ct. at 1045.

By contrast, under the Vermont and Mississippi "respective schemes, an amount awarded would be set aside or modified only if it was 'manifestly and grossly excessive[,]' or would be considered excessive when 'it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience.' " *Haslip*, 111 S. Ct. at 1045 n.10 (citations omitted).

The Oklahoma post-verdict appellate review scheme is indistinguishable from the Vermont and Mississippi schemes about which Justices of this Court have expressed their concern. An appellate court applying Oklahoma law *cannot* declare a jury's punitive damage award excessive " 'unless it appears to be grossly so, or the result of passion, prejudice or improper sympathy.' " *Badsen v. Mills*, 472 P.2d 889, 896 (Okla. 1970); *Buzzard v. Farmers Ins. Co., Inc.*, 824 P.2d 1105, 1115 (Okla. 1991) (same).

Furthermore, Oklahoma law "does not require the amount of punitive damages to be in a particular ratio to the amount of actual damages." *Buzzard*, 824 P.2d at 1105. The Oklahoma Supreme Court apparently accepts the proposition that " 'the courts of Oklahoma will not attempt to assess a ratio between actual and punitive damages.' " *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 918 (Okla. 1982). "[N]o rule of thumb may be formulated . . . in determining whether an award of punitive

damages is excessive," although the total amount in controversy *may* be considered. *Badsen*, 472 P.2d at 896. In *Haslip*, however, this Court held the ratio is *critical* to the due process inquiry, and that a punitive damage award only *four* times the amount of compensatory damages was "close to the line" of constitutional excessiveness under the Due Process Clause of the Fourteenth Amendment. *Haslip*, 111 S. Ct. at 1046. This Court has granted certiorari in *TXO* to revisit the ratio question.

In sum, appellate courts applying Oklahoma law cannot make an *independent* determination as to whether a punitive damage award exceeds the amount necessary to achieve society's goals of punishment and deterrence. Thus, in the present case, the Court of Appeal applying Oklahoma law could not overturn the punitive damage award even though it is *ten times* the compensatory award and *more than double the ratio found "close to the line" of constitutional excessiveness in Haslip*, unless the court was convinced the award is the result of the jury's "passion, prejudice or improper sympathy."

A heightened standard of appellate review is particularly important given the requirement that a punitive damage award not be "grossly out of proportion to the severity of the offense," and " 'not exceed an amount that will accomplish society's goals of punishment and deterrence.' " *Haslip*, 111 S. Ct. at 1045. However, appellate review of punitive damages under governing Oklahoma law is a toothless procedure. The lack of meaningful review "jar[s] one's constitutional sensibilities." *Haslip*, 111 S. Ct. at 1043.

D. Oklahoma's Post-Verdict Trial Court Review Is Clearly Inadequate Under *Haslip*.

In *Haslip*, this Court noted that an important element of due process is careful and independent review by the trial court of the amount of a punitive damage award. 111 S. Ct. at 1044. In holding that Alabama's system for awarding punitive damages is constitutional, *Haslip* explained that Alabama trial judges conduct an independent review of the jury's award and are required " 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages.' " *Haslip*, 111 S. Ct. at 1044, quoting *Hammond v. City of Gadsen*, 493 So. 2d 1374, 1379 (Ala. 1986).

> Among the factors deemed "appropriate for the trial court's consideration" are the "culpability of the defendant's conduct," the "desirability of discouraging others from similar conduct," the "impact upon the parties," and "other factors, such as the impact on innocent third parties."

111 S. Ct. at 1044, quoting *Hammond*, 493 So.2d at 1379.

By contrast, under Oklahoma law:

> It is . . . well settled that the amount of an award for punitive damages is peculiarly a matter for jury determination, and that such determination will not be interfered with lightly upon a claim of excessiveness. A jury award of punitive damages will not be held excessive . . . unless it appears to be grossly so, or the result of passion, prejudice or improper sympathy.

Badsen, 472 P.2d at 896 (citations and internal quotations omitted).

Although completely absent from the Oklahoma scheme, the requirement of independent review by the trial court, so critical to this Court's analysis in *Haslip*, is even more essential in Oklahoma. Alabama juries are never informed of a defendant's wealth and are therefore unlikely to be improperly influenced by it. In contrast, Oklahoma explicitly allows juries to be informed of the defendant's wealth, even before a finding of liability or actual damages.[7] *Spaeth v. Union Oil Co.*, 710 F.2d 1455, 1460 (10th Cir. 1983) (Oklahoma law).

The Oklahoma trial court's post-award review of a jury's punitive damage determination is constitutionally inadequate. In considering a claim of excessiveness, the court can *only* consider whether the verdict is "grossly" excessive or "the result of passion, prejudice or improper sympathy."[8] As explained above, this standard violates due process.

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[7] In the case at bar, the jury was told over defense objection that the total assets of defendant Farmers Group exceeded $10 billion and that the 1986 income of Farmers Group was above $213 million. R.T. at 1049-50. The jury received this information before it assessed liability or actual damages. Accordingly, the jury may have based its punitive award solely on the size of these numbers. Unlike Alabama plaintiffs, Oklahoma plaintiffs may "enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." *Haslip*, 111 S. Ct. at 1045.

[8] In *Mason*, the Court of Appeals for the Tenth Circuit held that a federal court may cure "mere excessiveness in the amount of an award" by a remittitur. *Mason*, 948 F.2d at 1561. However, courts in the Tenth Circuit determine excessiveness under a "shock the conscience" standard. *Id.*; *see also Broadcort Capital Corp. v. Summa Medical Corp.*, 972 F.2d 1183, 1193 (10th Cir.

Moreover, it cannot be seriously contended that a trial court's *pre*-verdict review of the evidence of punitive damages passes constitutional muster. Oklahoma allows a jury to award punitive damages up to the amount of actual damages based solely upon a preponderance of the evidence. If the court makes a preliminary finding by clear and convincing evidence on the record and out of the presence of the jury "that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed," the amount a jury may award is limitless. Okla. Stat. Ann. tit. 23, § 9 (West 1993).[9] Importantly, neither the Oklahoma legislature nor the Oklahoma Supreme Court has delineated any standard to review a trial court's determination under this statute.

1992). The "shock the conscience" standard is no more constitutional than the Vermont, Mississippi, or Oklahoma standardless standards discussed above.

[9] Significantly, the *jury* need not make such a finding by clear and convincing evidence. The limit applies or does not according to the *court's* finding. This seems a rather obvious violation of the defendant's constitutional right to a jury trial. *See* U.S. Const. amend VII. A defendant in federal court is entitled to have a jury make *any* factual determination which results in the award of punitive damages. *Johnson v. Hugo's Skateway*, 974 F.2d at 1416-17. The right to a jury trial exists in all actions where the right historically existed at common law. 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance and Procedure § 17.8, at 652 n.12 (2d ed. 1992). The early English cases recognized it was within the jury's province to award punitive damages. *See* 1 Linda L. Schlueter & Kenneth R. Redden, Punitive Damages § 1.3(a), at 8 (2d ed. 1989).

A trial court's pre-verdict review by definition does not allow consideration of either the excessive *amount* of punitive damages or an excessive *ratio* between compensatory damages and punitive damages. In *Haslip*, this Court held the ratio is *critical* to the due process inquiry, and a punitive damage award only *four* times the amount of compensatory damages was "close to the line" of constitutional excessiveness. *Haslip*, 111 S. Ct. at 1046. In this case, the trial court was not required – and indeed *could not* – independently review a 10:1 ratio, which is more than twice the ratio found constitutionally "close to the line" in *Haslip*. The Oklahoma trial court's standards for review of punitive damages are constitutionally inadequate.

E. The Jury Instructions Were Constitutionally Inadequate.

In *Haslip*, this Court approved jury instructions that "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, *and explained that their imposition was not compulsory.*" *Haslip*, 111 S. Ct. at 1044 (emphasis added).

In the case at bar, the jury instruction barely suggests the non-compulsory nature of punitive damages.[10] There

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[10] The court instructed the jury regarding punitive damages:

> . . . [I]n addition to actual damages to which you find plaintiffs entitled, you may award plaintiffs an additional amount as exemplary or punitive damages, in

is no clear-cut statement, as in *Haslip*, that "imposition of punitive damages is entirely discretionary with the jury, that means you don't have to award it unless the jury feels you should do so." *Id.* at 1037 n.1. The instruction, given the lack of any meaningful post-verdict review of the award, is constitutionally deficient.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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Counsel for Petitioner

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such sum as you believe will serve to punish the defendant and for the sake of example to deter other [sic] from like conduct.

R.T. at 1500.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

HAROLD MASSEY and DOROTHY MASSEY,	)	Nos. 88-2085
	)	88-2146
Plaintiffs-Appellees and Cross-Appellants,	)	(D.C. No. 87-324-C)
	)	(E.D. Okla.)
	)	(Filed
vs.	)	Feb. 09, 1993)
FARMERS INSURANCE GROUP, doing business as Truck Insurance Exchange, doing business as Truck Underwriters Association,	)	
Defendant-Appellant and Cross-Appellee.	)	

ORDER AND JUDGMENT*

Before TACHA and BALDOCK, Circuit Judges, and O'CONNOR, District Judge.**

This diversity case arising in Oklahoma involves claims for breach of an insurance contract and breach of

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** The Honorable Earl E. O'Connor, Chief Judge, United States District Court for the District of Kansas, sitting by designation.

the implied covenant of good faith and fair dealing. Following a jury trial, a judgment was entered in favor of Plaintiffs-Appellees Harold and Dorothy Massey, and they were awarded compensatory damages of $375,000, punitive damages of $4,000,000, prejudgment interest, attorneys fees and costs. Defendant-Appellant Farmers Insurance Group appeals from this judgment raising a number of alleged errors. Plaintiffs cross-appeal the district court's calculation of prejudgment interest and attorneys fees. We have jurisdiction under 28 U.S.C. § 1291.

I.

This case arose out of an arson fire at Plaintiffs' home. Defendant insured Plaintiffs against fire loss to their home with policy limits of $75,000. Defendant's adjuster, Joe Delacerda, determined that Plaintiffs were not involved in the arson. Delacerda made a preliminary finding that the house could be repaired for approximately $45,000. Delacerda asked Mr. Massey to obtain estimates from two contractors. Mr. Massey obtained estimates from Simon-Price Construction and Gerald Eaves Construction which he submitted to Defendant. Both of these estimates exceeded $100,000 and involved demolishing the remaining structure and completely rebuilding the house.

After receiving Plaintiffs' estimates Defendant adjusted its loss reserves up to the policy limits. Delacerda then obtained an estimate to repair the house for approximately $47,000 from First General Services of Tulsa. Contrary to Defendant's own policy, Delacerda did not obtain a second estimate. Three weeks after receiving

Plaintiffs' estimates, Defendant notified Plaintiffs that their policy on the damaged house as well as a separate policy on Plaintiffs' business would be cancelled effective at the end of the month. Soon thereafter, Defendant retained an attorney, Ray Wilburn, to represent it in the matter.

The central dispute at this point was whether repairing the house would restore it to its prefire condition or whether the house would have to be torn down and completely rebuilt to restore it to its prefire condition. With the parties at an impasse, Defendant invoked the statutory appraisal clause of the policy. *See* Okla. Stat. Ann. tit. 36, § 4803 (West 1990). This clause provides that in the event that the parties fail to agree on the amount of loss, either party may invoke the appraisal process. Once this process is invoked, each party is required to select a competent and disinterested appraiser. The appraisers then select an umpire, and, if the appraisers cannot agree on an umpire, a court shall select the umpire. Each appraiser then submits an itemized appraisal of the loss. The appraisers' differences are submitted to the umpire who then determines the amount of the loss. Each party is expected to bear the cost of its own appraiser, and the parties equally share the cost of the umpire. Plaintiffs offered evidence at trial that it was contrary to Defendant's company policy to invoke the appraisal process, although Defendant sharply contested this fact claiming that the training manual upon which Plaintiffs relied was outdated and no longer reflected company policy.

Defendant initially appointed attorney Wilburn as its "disinterested" appraiser despite the fact that Wilburn

was already actively representing Defendant as its attorney in this matter. Moreover, Wilburn's firm did a significant amount of other legal work on Defendant's behalf, receiving over $2.4 million in fees from Defendant for a two-year period. After Plaintiffs objected to Wilburn's capacity to be disinterested and to his competency as an appraiser, Defendant substituted Peter Murlowski as their appraiser. Murlowski was employed by First General Services of Tulsa – the firm that had earlier given Defendant an estimate to repair the house. Evidence at trial indicated that First General depended on insurance repair work for 95% of its business, and 25% of its business came from Defendant. Wilburn informed Murlowski that Defendant expected Murlowski to stand by his initial estimate. Upon inspecting the house, Murlowski maintained that the house could be repaired but adjusted his initial estimate of approximately $47,000 upward by approximately $2,000.

Plaintiffs appointed Dan Simmons of Simmons-Price Construction, which had prepared one of Plaintiffs' earlier estimates to rebuild the house. Simmons maintained that the house would have to be completely rebuilt at a cost of approximately $100,000 to restore it to its prefire condition. Thus, Simmons and Murlowski were unable to agree, and neither appraiser suggested the appointment of an umpire.

Plaintiffs filed suit in state district court for breach of contract and breach of the implied covenant of good faith and fair dealing. Subsequently, Defendant moved the court for the appointment of an umpire pursuant to the statutory appraisal process. At the suggestion of Defendant's counsel, the court appointed David Lambert, a

local builder who specialized in commercial building and served on the Board of Directors of two insurance companies. Lambert inspected the property and received incomplete estimates from Murlowski and Simmons. The Murlowski estimate did not have any dollar values placed on it, and the Simmons estimate was merely three lines rather than the itemized estimate he had earlier provided to Defendant. Lambert never attempted to negotiate a compromise between Murlowski and Simmons. Rather, Lambert prepared a report finding the house could be rebuilt at a cost of approximately $49,000, consistent with the Murlowski estimate. Although Defendant tendered payment, Plaintiffs rejected the settlement, dismissed their retained attorney, and, acting *pro se*, moved the court to reconsider the umpire's estimate on the basis of alleged improprieties in the appraisal process. With their motion to reconsider pending, Plaintiffs, upon the advice of their newly retained counsel, dismissed their state action without prejudice under Okla. Stat. Ann. tit. 12, § 683 (West 1988).

Plaintiffs refiled their suit in the Oklahoma federal district court on the basis of diversity jurisdiction. 28 U.S.C. § 1332. Following a jury trial, Plaintiffs were awarded $75,000 for loss of their home, $15,000 for additional living expenses and $300,000 in consequential damages for Defendant's breach of the insurance policy as well as $4,000,000 in punitive damages for Defendant's breach of the implied covenant of good faith and fair dealing. The district court further awarded Plaintiffs attorney fees of $376,275, prejudgment interest exceeding $390,000 and costs totalling $44,766.

II.

Among its many contentions, Defendant initially asserts that the state court umpire's damage appraisal of Plaintiffs' home is conclusive on the issue of the amount necessary to restore the dwelling to its prefire condition, and thus fixed the damages due on the dwelling. Defendant further asserts that if the umpire's award is valid, then Defendant could not have acted in bad faith because Plaintiffs' case rests upon Defendant's purportedly improper handling of the appraisal process.

In the interest of comity, and pursuant to Okla. Stat. Ann. tit. 20, §§ 1602-1605 (West Supp. 1990), we certified the following question to the Oklahoma Supreme Court:

> Under Oklahoma law, what is the preclusive effect of a court-appointed umpire's damage appraisal under a statutorily-mandated provision of a fire insurance policy, where the insured, as of right, dismisses without prejudice an initial lawsuit without challenging the umpire's appraisal and, thereafter, institutes a subsequent lawsuit on the same cause of action in another court?

Massey v. Farmers Ins. Group, No. 88-2085, slip op. at 2 (10th Cir. Mar. 26, 1990) (certification order). The Oklahoma Supreme Court has since answered the question by holding that "a court-appointed umpire's damage appraisal under the statutorily-mandated provision of a fire insurance policy, [Okla. Stat. Ann. tit. 36, § 4803(G) (West 1990)], has no preclusive effect upon the party who did not demand the appraisal process." *Massey v. Farmers Ins. Group*, 837 P.2d 880, 885 (Okla. 1992). Accordingly,

because Plaintiffs did not demand the appraisal process, the earlier appraisal by the state court appointed umpire has no preclusive effect on Plaintiffs' present action. Therefore, the district court did not err in denying Defendant's motion for summary judgment and motion for a directed verdict on this issue.

III.

Defendant raises three challenges to the sufficiency of the evidence: (A) the evidence was insufficient to support the contractual damage award for additional living expenses; (B) the evidence was insufficient for the jury to find that Defendant breached the implied covenant of good faith and fair dealing; and (C) the evidence was insufficient for the jury to find that Defendant acted with fraud, malice or oppression. We view the evidence and all reasonable inferences therefrom in the light most favorable to Plaintiffs and can reverse only when it is clear that reasonable minds could not differ on the conclusion. *Pytlik v. Professional Resources, Ltd.*, 887 F.2d 1371, 1380 (10th Cir. 1989); *McKinney v. Gannett Co., Inc.*, 817 F.2d 659, 663 (10th Cir. 1987).

A.

The jury awarded Plaintiffs $15,000 in additional living expenses. Such expenses were covered under a provision of the policy which read as follows:

> If a covered property loss makes the residence premises unfit to live in, we cover the necessary increase in living expense incurred by you so that your household can maintain its normal

> standard of living. We shall pay for the shortest time needed to (a) repair or replace the damaged property or (b) permanently relocate.

Harold Massey testified that he requested additional living expenses of $906 per month which were denied by Defendant. Defendant claims that this request was based on what Mr. Massey perceived as the fair market value of the house destroyed in the fire, and that Defendant had changed its policy so as to no longer reimburse for the fair market value of the destroyed property. However, whether the additional living expense provision included the fair market value of the damaged property during the period of its restoration was a disputed fact properly left to the resolution of the jury. Further, Defendant overlooks the additional testimony that after it cancelled Plaintiffs' insurance, Plaintiffs incurred $10,000 to $12,000 in additional expenses to make another building on Plaintiffs' property habitable. Taking all reasonable inferences from this testimony in Plaintiffs' favor, we cannot say that reasonable minds could not differ on the conclusion.

B.

Defendant next claims that the evidence was insufficient for the jury to find that Defendants breached the implied covenant of good faith and fair dealing. The parties agree that Oklahoma recognizes a cause of action sounding in tort for the bad faith breach of an insurance contract. *See Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1108-09 (Okla. 1991); *McCorkle v. Great Atl. Ins. Co.*, 637 P.2d 583, 588 (Okla. 1981). However, the parties dispute the quantum of evidence necessary to submit this issue to the jury.

1.

Defendant argues that unless Plaintiffs were entitled to a directed verdict on the breach of contract claim, the bad faith claim should not have been submitted to the jury. Defendant relies on *National Sav. Life Ins. Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982), in which the Alabama Supreme Court stated, "[o]rdinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury." *Id.* at 1362.

In support of its contention that Oklahoma follows the rule announced in *Dutton*, Defendant directs us to *Christian v. American Assurance Co.*, 577 P.2d 899 (Okla. 1977), *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982), and *Manis v. Hartford Fire Ins. Co.*, 681 P.2d 760 (Okla. 1984). In *Christian*, which was the first Oklahoma case to recognize a cause of action sounding in tort against an insurer for breaching an implied duty to deal fairly and act in good faith with its insured, the court affirmed a bad faith judgment based on an insurer's failure to pay a claim to which it had no defense. However, *Christian* does not suggest that an insurer's absence of a defense to a breach of contract claim is a necessary predicate to a bad faith cause of action. Indeed, in *Timmons*, also relied on by Defendant, the court affirmed a bad faith judgment based on the insurer's actions in investigating the claim, despite the fact that the insurer

had several defenses to the contract action.[1] The *Timmons* court recognized that "[t]he essence of the cause before the Court is failure to deal fairly and in good faith with an insured and as such, the jury may be shown the entire course of conduct between the parties to arrive at a determination of whether that standard had been breached or not." 653 P.2d at 917. While the Oklahoma Supreme Court reversed a bad faith judgment in *Manis* where the insurer refused to pay a claim for fire loss claiming that the insured intentionally set the fire, the bad faith claim was based solely on the insurer's refusal to pay and there was no other evidence that insurer failed to deal fairly with the insured. Thus, even though the jury rejected the insurer's arson defense on the contract claim, the *Manis* court found that there was no evidence that the insurer acted in bad faith in pursuing the defense.

In contrast to *Manis*, Plaintiffs' bad faith claim was based on Defendant's abuse of the statutory and contractual appraisal process.[2] The Oklahoma Supreme Court has made it clear that the question of bad faith turns on

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[1] Defendant contends that *Timmons* supports its position because prior to the bad faith action, the insured's liability to a third party had already been discharged by the insurer and thus the contract claim had already been resolved. 653 P.2d at 911.

[2] We note that, although Defendant's investigation indicated that the fire was intentionally set, Defendant never sought to deny coverage on the grounds that Plaintiffs were responsible for the fire, nor did Defendant assert such a defense at trial. Indeed, the district court granted Plaintiffs' motion in limine excluding all reference to any responsibility on the part of Plaintiffs for the fire.

the intent and reasonableness of the insurer's action, and the "crucial consideration" in determining whether to submit the issue to the jury is "the relative merit in the evidence supporting [the insurer's] defense." *Conti v. Republic Underwriters Ins. Co.*, 782 P.2d 1357, 1361 (Okla. 1989). In *McCorkle v. Great Atl. Ins. Co.*, 637 P.2d 583 (Okla. 1981), the Oklahoma Supreme Court rejected the argument that allowing a bad faith cause of action denies insurers their right to have a judicial determination on the amount due on a fire insurance policy, noting that "a party prosecuting a claim of bad faith must plead the elements of the tort and he/she has the burden of proof. The pleading and proof requirements are the same as in other lawsuits." *Id.* at 587. Clearly rejecting the argument raised by Defendant here, the *McCorkle* court stated that

> the essence of the intentional tort of bad faith with regard to the insurance industry is the insurer's unreasonable, bad-faith conduct . . . and if there is conflicting evidence from which different inferences may be drawn regarding the reasonableness of insurer's conduct, then what is reasonable is always a question to be determined by the trier of fact by a consideration of the circumstances in each case.

Id. More recently, the Oklahoma Supreme Court recognized that whether or not an insured is legally entitled to recover under the policy is not the "controlling issue" in a bad faith action based on a denial of coverage; rather, the bad faith issue, in such a case, turns on "whether [the insurer], at the time [the insureds] made their claim, was in possession of information to establish that its refusal to pay was in good faith. . . . " *Buzzard v. McDanel*, 736 P.2d 157, 159 n.3 (Okla. 1987). Similarly, in *McCoy v. Oklahoma*

Farm Bureau Mut. Ins. Co., 841 P.2d 568 (Okla. 1992), the court held that the issue of bad faith was properly submitted to the jury despite the existence of a triable issue as to whether the insured had burned down his own house. *Id.* at 570-72. Thus, we reject Defendant's argument that Plaintiffs must have been entitled to a directed verdict on the breach of contract claim in order to submit the bad faith claim to the jury.

2.

We turn to the question of whether a reasonable jury could have found that Defendant breached the implied covenant of good faith and fair dealing. Plaintiffs' cause of action was based on Defendant's handling of their claim, specifically Defendant's abuse of the statutory and contractual appraisal process. The Oklahoma Supreme Court has recognized that the manner in which an insurer handles a claim may be the basis for a bad faith judgment, *see Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1109 (Okla. 1991); *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 917-18 (Okla. 1982), as well as actions by an insurer which unreasonably withhold the payment of claims. *Christian v. American Assurance Co.*, 577 P.2d 899, 904-05 (Okla. 1977).

Taken in the light most favorable to Plaintiffs, the evidence at trial amply supported Plaintiffs' claim that Defendant acted in bad faith by manipulating and abusing the statutory and contractual appraisal process. First, according to Defendant's own training manual, it was against company policy to invoke the appraisal process

or to even call it to the attention of the insured.[3] Nevertheless, Defendant did invoke the appraisal process following the fire which destroyed Plaintiffs' home. Second, under the appraisal process, each party is required to appoint a "competent and disinterested appraiser" once either party has made a written demand for an appraisal. Okla. Stat. Ann. tit. 36 § 4803 (West 1990). Substantial evidence was presented that the first appraiser appointed by Defendant was not competent, and that neither of the two appraisers appointed by Defendant were disinterested. Defendant's first appraiser, Wilburn, was an attorney who did substantial work on Defendant's behalf, and indeed had been retained by Defendant to represent it in its dealings with Plaintiffs. The second appraiser, Murlowski, relied on insurance work, a substantial portion of which was from Defendant, for his livelihood, and he had earlier provided an estimate for repairing the house. Moreover, there was direct evidence, in the form of a letter by one of Defendant's attorney [sic] who happened to be an associate of Wilburn, that Defendant attempted to improperly influence the second appraiser by conveying its expectation that the appraiser would stand by his estimate to rebuild the house. Thus, Defendant's overt failure to follow the terms of its own policy regarding the appraisal process provides substantial evidence that Defendant acted unreasonably and in bad faith.

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[3] Although Defendant presented testimony that the training manual did not reflect current company policy, whether Defendant complied with its own internal policy was a disputed issue for the jury's resolution.

Other evidence submitted by Plaintiffs could reasonably lead the jury to infer that Defendant attempted to pressure Plaintiffs into accepting the lesser amount to repair the house, as opposed to having it rebuilt. Defendant took an average of thirty-seven days to submit a loss for authority to settle; however, in this case, Defendant took eighty-five days to submit the contents portion of Plaintiffs' claim. A reasonable inference is that Defendant delayed payment on the contents in order to pressure Plaintiffs to settle on the structure, thereby supporting Plaintiffs' assertion that Defendant acted unreasonably and in bad faith in handling Plaintiffs' claim. Furthermore, Defendant cancelled Plaintiffs' insurance policies even though Defendant's own investigation indicated that Plaintiffs were not at fault for the fire. Again, it was reasonable for the jury to infer that this cancellation was an attempt to pressure Plaintiffs into settling the loss on the structure.

Finally, in addition to the evidence concerning Defendant's abuse of the appraisal process and the evidence supporting the inference that Defendant attempted to pressure Plaintiffs into accepting its offer, there was substantial evidence that Defendant's actions unreasonably withheld the payment of Plaintiffs' claim. There was testimony that the branch office's authority to settle a claim on a structure was limited to $40,000, and any claim in excess had to be submitted to the regional office for approval. Defendant's own estimate exceeded $40,000, yet defendant waited until June 5, 1986, almost a year after the fire, to request settlement authority from the regional officer. When authority was finally granted to

settle Plaintiffs' claim for the policy limits of $75,000, Defendant never offered this amount to Plaintiffs.

In light of this evidence, and the reasonable inferences that may be drawn from it, the evidence was more than sufficient to submit the issue of whether Defendant breached the implied covenant of good faith and fair dealing to the jury.

C.

Defendant also contends that, even if there was sufficient evidence of bad faith, the evidence was insufficient to show that Defendant acted fraudulently, maliciously or oppressively, and, therefore, the punitive judgment award cannot stand. Under Oklahoma law, malice may be inferred when a party commits willful acts in reckless disregard of another's rights. *Slocum v. Phillips Petroleum Co.*, 678 P.2d 716, 719 (Okla. 1983). Our review of the evidence, and specifically Defendant's failure to follow the terms of its own policy regarding the appraisal process, convinces us that an inference of malice could properly be drawn by the jury.

Defendant raises a related argument, which although purporting to challenge the sufficiency of the jury instruction on punitive damages, appears to be based on the district court's finding, pursuant to Okla. Stat. Ann. tit. 23, § 9 (West 1987), that there was clear and convincing evidence to support the award of punitive damages. Oklahoma law requires the district court, at the conclusion of all the evidence, to make a finding outside of the presence of the jury "that there is clear and convincing evidence that the defendant is guilty of conduct evincing

a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed" in order for the jury to award punitive damages. *Id.* When the district court makes such a finding, the limitation on punitive damages to the amount of actual damages, *see id.* (historical note) (discussing 1986 amendment), does not apply. *Id.*

The district court found that there was "certainly clear and convincing evidence that the defendant is guilty of conduct evincing the wanton and reckless disregard for the rights of others." VIII R. trans. at 1422. For the reasons heretofore stated, we believe that the district court's finding is supported by the record. Because willful acts in reckless disregard of Plaintiffs' rights may lead to an inference of malice, *Slocum v. Phillips Petroleum Co.*, 678 P.2d 716, 719 (Okla. 1983), the district court properly submitted this issue to the jury without limiting the punitive damages to the amount of actual damages.

IV.

Defendant raises a myriad of claims alleging error in the admission of evidence. We review the district court's ruling on the admissibility of the evidence for an abuse of discretion. *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1155 (10th Cir. 1985); *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978). Even if the district court abuses its discretion by erroneously admitting particular evidence, we will not reverse a judgment when the error is harmless – *i.e.* when the error does not affect a substantial right of the party asserting error. *K-B Trucking*, 763

F.2d at 1156. *See also* Fed. R. Civ. P. 61; Fed. R. Evid. 103(a). "[T]he burden of demonstrating that substantial rights were affected rests with the party asserting error." *K-B Trucking*, 763 F.2d at 1156.

A.

Defendant claims that the district court erred in admitting evidence concerning the worth of companies that do business under the name Farmers Insurance Group. According to Defendant, evidence of its worth, which was relevant to the issue of the amount of punitive damages, should have been limited to evidence of the worth of Truck Insurance Exchange/Truck Underwriters Association which is the named party on the insurance policy. Although Defendant has not specified the Federal Rule of Evidence which purportedly renders this evidence inadmissible, Defendant's argument appears to be based on relevancy. *See* Fed R. Evid. 402.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Under Oklahoma law, punitive damages are awarded to punish wrongdoers for wrongs committed upon society and to deter them from such conduct in the future. Okla. Stat. Ann. tit. 23, § 9 (1987). Accordingly, evidence of the worth of a party against whom punitive damages are being sought is relevant to the issue of the amount of damages necessary to

sufficiently punish and deter the party.[4] *See Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1460 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986); *Spaeth v. Union Oil Co.*, 762 F.2d 865, 866 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986).

Nonetheless, Defendant argues that Farmers Insurance Group was not a party to the contract and therefore could not be liable for bad faith breach of the contract. *See Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 912-13 (Okla. 1982). Thus, Defendant argues that evidence of the worth of Farmers Insurance Group should not have been admitted. This is a curious proposition considering that Farmers Insurance Group is the named defendant in the lawsuit. Under Defendant's reasoning, evidence of its worth should have been limited to the worth of Truck Insurance Exchange/Truck Underwriter Association, a subordinate entity within the rubric of companies forming Farmers Insurance Group. In light of the evidence in the record showing a significant financial relationship between Farmers Insurance Group and Truck Insurance Exchange/Truck Underwriters Association, Farmers Insurance Group's control over the subordinate entity in the handling of claims in general, and the handling of the

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[4] Defendant claims that the evidence was prejudicial because Farmers Insurance Group had assets of $10.1 billion in 1986 while Truck Insurance Exchange/Truck Underwriters Association had assets of between $700-800 million and a net worth of $356 million, thereby making the jury more inclined to award a greater amount of punitive damages. Nonetheless, we do not reach the question of prejudice in light of our holding, based on the record before us, that Farmers Insurance Group is the relevant entity.

claim in this case in particular, we believe that the worth of Farmers Insurance Group is the relevant inquiry in determining the amount of damages sufficient to punish and deter Defendant from its tortious conduct.

B.

Defendant next claims that the admission of evidence concerning its granting of settlement authority in the amount of $75,000 to its branch office in June 1986 violated Fed. R. Evid. 408. This rule provides that

> [e]vidence of (1) furnishing or offering or promising to furnish . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for . . . the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Fed. R. Evid. 408. Defendant's argument fails for at least two reasons. First, the evidence was undisputed that Defendant never furnished, offered or promised to furnish $75,000 to settle Plaintiffs' claim, nor was this evidence of conduct in compromise negotiations. Thus, the evidence was not the type for which a Rule 408 objection will lie. Second, the evidence was not offered to prove liability. Rather, Plaintiffs offered this evidence to show that, by June 1986, Defendant had evaluated the loss at the policy limits but *failed* to offer this amount to Plaintiffs. Therefore, because the evidence was relevant to the issue of whether Defendant unjustifiably withheld payment of the claim thereby breaching the implied covenant

of good faith and fair dealing, we find no abuse of discretion in its admission.

C.

Defendant next contends that the district court erred in admitting evidence that Defendant cancelled Plaintiffs' three other policies following the fire. Defendant's sole argument on appeal is that such evidence was not admissible because the cancellation of the policies did not violate Okla. Stat. Ann. tit. 36, § 4807 (West 1990), which limits the reasons insurers may cancel policies. Whether or not the cancellation of the policies violated state law, this evidence was properly admitted to show the course of dealing between Defendant and Plaintiffs and tended to support Plaintiffs' argument that Defendant cancelled the policies to pressure Plaintiffs into settling the loss on their dwelling. Accordingly, we find no abuse of discretion in admitting this evidence.

D.

Defendant argues that the district court erred in admitting the depositions of Charles Medlock, an employee of defendant, and Peter Murlowski, an independent contractor whom Defendant hired as its second appraiser. Again, Defendant's brief does not specifically articulate why the deposition testimony was inadmissible. However, Defendant asserts that the videotaped depositions should not have been admitted because both persons were available to testify and because Murlowski was not an agent of Defendant. Further, Defendant argues that the district court's informing the jury that the

deposition testimony were admissions against interest was prejudicial to Defendant. While we do not necessarily agree with the specifics of Defendant's argument, we agree that district court abused its discretion in admitting the videotaped depositions.

The use of depositions in a court proceeding is governed by Rule 32 of the Federal Rules of Civil Procedure. The deposition must be admissible under the rules of evidence[5] and may only be admitted against a party who was present or represented at the deposition. Fed. R. Civ. P. 32(a). Moreover, Rule 32 further limits the admissibility of depositions in court proceedings. A "deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence." Fed. R. Civ. P. 32(a)(1).[6] Neither Medlock nor

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[5] Although the district court stated that the deposition was an "admission against interest," it appears that what it meant was that the deposition was an admission by an agent of a party opponent. This distinction is important because an admission by the agent of a party opponent is considered non-hearsay and does not require unavailability of the declarant, Fed. R. Evid. 801(d)(2), while a statement against interest is considered an exception to the hearsay rule and does require the unavailability of the declarant. *Id.* 804(b)(3). While we recognize Defendant's argument that Murlowski was not its agent, and, therefore, his deposition was not admissible under Fed. R. Evid. 801(d)(2)(D), we need not resolve this issue because neither deposition was admissible under Fed. R. Civ. P. 32.

[6] While the rule does allow the deposition to be used "for any other purpose permitted by the Federal Rules of Evidence," this provision was added by the 1980 amendment to allow the use of depositions to bring in prior inconsistent statements admissible under Fed. R. Evid. 801(d)(1). 4A James W. Moore,

Murlowski testified prior to the introduction of their deposition; therefore, their depositions were not admissible as impeachment. Rule 32 also permits "the deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party" to be used in a court proceeding by an adverse party. Fed. R. Civ. P. 32(a)(2). While Plaintiffs claim that Medlock and Murlowski were agents of Defendant, there is no contention that they were "officers, directors, managing agents, or persons designated pursuant to Rule 30(b)(6) or 31(a)" to testify on behalf of Defendant. Finally, Rule 32 permits the use of depositions in court proceedings when the witness is unavailable to testify for particular reasons or when the court finds "exceptional circumstances." Fed. R. Civ. P. 32(a)(3). Here, both witnesses were available to testify, and there is no claim that exceptional circumstances existed. Accordingly, the depositions of Medlock and Murlowski were not properly admitted into evidence.

Having found error in the admission of the depositions, we turn to the question of whether it affected a

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Moore's Federal Practice, ¶ 32.03, at 32.17 (2d ed. 1992). The fact that the deposition may be admissible under Fed. R. Evid. 801(d)(4)(D) as an admission by an agent of a party opponent, does not make it admissible "for any other purpose" under Fed. R. Civ. P. 32(a)(1). *See* 4A Moore, *supra*, ¶ 32.04, at 32-25. *See also* Fed. R. Civ. P. 32 (Advisory Committee Note to 1980 Amendment) (noting that language of subdivision (a)(1) is "too narrow" so as to be consistent with Fed. R. Evid. 801(d)(2)).

substantial right of Defendant. We note that since both witness [sic] were available, Defendant had the opportunity to call them to the stand to rehabilitate their testimony, and, in fact, did so with respect to Murlowski. Further, Medlock's deposition was videotaped and the tape was presented to the jury, thereby permitting the jury to view the demeanor of the witness. Finally, Defendant offers no argument as to how it was prejudiced by the admission of the depositions, and given that the testimony appears to be largely undisputed,[7] we fail to see how a substantial right of Defendant has been affected. Thus, we hold that the district court's error in admitting the depositions of Medlock and Murlowski was harmless.

V.

Defendant next claims error in the instructions to the jury. In reviewing jury instructions, we must "consider all that the jury heard and . . . decide not whether the charge

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[7] Medlock testified about Defendant's procedures in handling claims, the chain of command within Defendant's company, the authority to settle claims within the various levels of Defendant's company, Defendant's relationship with Wilburn, Medlock's specific request to Wilburn in June 1986 to settle Plaintiffs' claim for the policy limits, and the cancellation of Plaintiffs' other policies. Defendant has not disputed any of this testimony.

Murlowski testified about the nature of his insurance repair business and his relationship with insurance companies in general and Defendant in particular. Murlowski also testified about his work on Defendant's behalf in estimating and appraising Plaintiffs' loss. Again, Defendant has not disputed any of this testimony.

was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine these issues." *Durflinger v. Artiles*, 727 F.2d 888, 895 (10th Cir. 1989). *See also Ramsey v. Culpepper*, 738 F.2d 1092, 1098 (10th Cir. 1984). "[A]n error in the jury instructions will mandate reversal only if the error is determined to have been prejudicial, based on a review of the record as a whole." *Durflinger*, 727 F.2d at 895 (internal quotations omitted).

A.

Defendant first contends that the district court erred in failing to instruct the jury that attorneys fees and interest should not be included in the award of damages. Given that no evidence was presented concerning attorneys fees and interest, we fail to see the necessity of such an instruction and find no abuse of discretion in failing to give it.

B.

Defendant next contends that the district court erred in failing to give Defendant's proffered instruction concerning the contract measure of damages under the dwelling coverage provision of the policy. On the issue of damages for the breach of contract claim, the district court instructed the jury as follows:

> If you find that the defendant is liable to plaintiffs on their breach of contract cause of action you must then fix the amount of money which will reasonably and fairly compensate plaintiffs for any of the following elements of damage

proved by the evidence to have resulted from the defendant's breach of contract:

1. Fire and casualty loss to plaintiff's [sic] residence;

2. Additional living expenses.

Although Defendant has not directed this court to where in the record we can find its specific proffered instruction on the issue, defense counsel characterized the instruction to the district court as limiting Defendant's liability under the dwelling coverage "as being the smallest of the . . . policy limit . . . replacement . . . [or] the amount actually and necessarily expended to repair the house." IX R. trans. at 1428-29. Although the district court's instruction may not have been a model of completeness, in light of the alternative presented by Defendant, we cannot say that the district court abused its discretion.

C.

Finally, Defendant claims that it was error to instruct the jury on the statutory duty of insurance companies under the Oklahoma Fair Claims Resolution Act, because the act was not effective until June 1986 or November 1986 while the loss occurred in June 1985 and because the act does not apply to private causes of action. Although Defendant has not directed us to where in the record we can find this allegedly erroneous instruction, Defendant's objection appears to relate to the district court's instruction regarding "acts constitut[ing] unfair claim settlement practices," *see* Okla. Stat. Ann. tit. 36, § 1222 (West Supp. 1993); IX R. trans. at 1501-02, and its instruction regarding prohibited acts by an insurer and its agent. Okla. Stat.

Ann. tit. 36, § 1254 (West Supp. 1993); IX R. trans. at 1502-03. Section 1222 was not effective until June 1986, and Section 1254 was not effective until November 1986.[8]

In regards to Defendant's claim that the statutes do not apply to private causes of action, our review of the record indicates that Defendant did not object to the instruction on this ground. Rule 51 of the Federal Rules of Civil Procedure provides that "[n]o party may assign as error the giving . . . an instruction unless that party objects thereto before the jury retires to consider its verdict, *stating distinctly the matter objected to and the grounds of the objection.*" Fed. R. Civ. P. 51 (emphasis added). Because Defendant's objection was limited solely to the ground that the statutes were not effective until June or November 1986, Defendant has waived the issue of whether the statutes are applicable to private causes of action.

As to Defendant's claim that the instructions were erroneous because the statutes were not effective until June or November 1986, Defendant's actions induced the trial court into giving the instruction; therefore, Defendant is precluded from raising this issue on appeal by the "invited error" doctrine. "When a party wishing to raise a

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[8] The district court also instructed the jury on Oklahoma's statutory limitation on the grounds for which an insurer can cancel coverage. *See* Okla. Stat. Ann. tit. 36, § 3639(C) (West 1990). *See also* IX R. trans. at 1500-01. However, Defendant's argument, which is limited to the statutes that were effective in June or November 1986, does not appear to challenge this instruction, because the statute on which it was based was effective in July 1985. *See* Okla. Stat. Ann. tit. 36, § 3639 (Historical and Statutory Notes).

new issue on appeal has by its words or actions invited the alleged error below, it is particularly inappropriate to consider that theory of relief on appeal." *Hokansen v. United States*, 868 F.2d 372, 378 (10th Cir. 1989) (citation omitted). *See also Gundy v. United States*, 728 F.2d 484, 488 (10th Cir. 1984) ("[A]n appellant may not complain on appeal of errors which he himself induced or invited."). After Defendant objected to these instructions on the ground that the statutes were not effective until after the date of Plaintiffs' loss, Plaintiffs offered to amend the instruction to specifically inform the jury that Defendant's statutory duties applied only to its acts taken after the effective date of the statute. Defendant declined Plaintiffs' amendment claiming that it "would then place the burden on an insurance adjuster to anticipate what the law might be a year later." IX R. trans. at 1433. According to defense counsel, the instruction as offered to be amended by Plaintiffs would "have a prejudicial effect;" *id.*, however, defense counsel failed to specify, either in the district court or on appeal, how the instruction as amended would have been prejudicial. The district court indicated that it was inclined to amend the instruction to make clear that Defendant's statutory duty only applied to acts taken after the effective date of the statute, but declined to amend the instruction based on Defendant's objection to the amendment. While we agree that any statutory duty of Defendant would only arise after the effective date of the statute, it is undisputed that Defendant continued to handle Plaintiffs' claim after the effective dates of the statutes. Given that the statutes were in effect at the time of at least some of Defendant's acts which gave rise to Plaintiffs' bad faith claim, we do

not see how Plaintiffs' amendment would have prejudiced Defendant, and, as noted earlier, Defendant neglects to inform us as to the nature of the prejudice. Indeed, it appears that Plaintiffs' amendment would have cured the very objection raised by Defendant on appeal. Under these circumstances, Defendant's objection to Plaintiffs' amendment invited the very error of which Defendant now complains; therefore, this issue cannot be raised on appeal.

VI.

Defendant argues that the $4,000,000 punitive damage award violates the Eighth Amendment's proscription against excessive fines. The "Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989). Thus, Defendant's argument is without merit.[9]

VII.

Defendant argues that the district court improperly calculated the attorneys fees award. Under Oklahoma law, attorneys fees are awarded to the prevailing party in an action between an insurer and an insured. Okla. Stat. Ann. tit. 36, § 3629(B) (West 1990). The district court

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[9] While the Supreme Court has recognized that the due process clause may provide some limits on awarding punitive damages, *see Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1043-46 (1991), Defendant's argument is limited to an Eighth Amendment challenge.

calculated the attorneys fees based on the time spent prosecuting both the breach of contract claim and the bad faith claim. Defendant concedes that attorneys fees are recoverable on the breach of contract claim but argues that such fees are not recoverable on the bad faith claim. Defendant argues that the district court should have apportioned the time of Plaintiffs' attorneys between the two claims. We have squarely rejected this argument. *See Thompson v. Shelter Mutual Ins.*, 875 F.2d 1460, 1464 (10th Cir. 1989). *See also Oliver's Sports Center v. National Standard Ins. Co.*, 615 P.2d 291, 295 (Okla. 1980) (recognizing recovery of attorneys fees under § 3629(B) for time spent prosecuting bad faith claim).

VIII.

In their cross-appeal, Plaintiffs raise three arguments. First, Plaintiffs contend that the district court erred in limiting the prejudgment interest solely to the compensatory damages. Second, Plaintiffs contend that the district court erred in determining "the date the loss was payable" for purposes of calculating the award of prejudgment interest. Finally, Plaintiffs contend that the district court erred in calculating the award of attorneys fees. We find no merit in any of Plaintiffs' arguments.

A.

Plaintiffs first argue that punitive damages should be included in the calculation of the prejudgment interest award. Oklahoma law provides for the award of prejudgment interest "on the verdict at the rate of fifteen percent

(15%) per year from the date the loss was payable pursuant to the provisions of the contract to the date of the verdict." Okla. Stat. Ann. tit. 36, § 3629 (West 1990). Plaintiffs rely on *Oliver's Sports Center v. National Standard Ins. Co.*, 615 P.2d 291 (Okla. 1980), wherein the Oklahoma Supreme Court recognized that an attorney's time in prosecuting a bad faith claim could be included in the attorneys fees calculation under § 3629. *Id.* at 295.

In *Casto v. Arkansas-Louisiana Gas Co.*, 562 F.2d 622 (10th Cir. 1977), we held that prejudgment interest was not recoverable on a punitive damage award under Okla. Stat. Ann. tit. 12, § 727(2), a similar Oklahoma statute governing prejudgment interest on damages by reason of personal injury. *Id.* at 625-26. We reasoned that express terms of the statute limited prejudgment interest to a "verdict for damages by reason of personal injuries." *Id.* at 625. Moreover, we noted that punitive damages are in the nature of punishment, rather than compensation. *Id.* *See also* Okla. Stat. Ann. tit. 23, § 9.

While the language of §3629, unlike the statute at issue in *Casto*, does not expressly preclude prejudgment interest on punitive damages, we do not believe that the Oklahoma Supreme Court would interpret § 3629 to provide for prejudgment interest on a punitive damage award. As we noted in *Casto*, punitive damages are designed to punish the defendant rather than compensate the plaintiff. 562 F.2d at 625. *See also* Okla. Stat. Ann. tit. 23, § 9 (West 1987). Awarding prejudgment interest on compensatory damages fulfills the underlying purpose of making Plaintiffs whole. By contrast, allowing prejudgment interest on punitive damages would only serve to further punish Defendant when the jury has already

determined the amount necessary to sufficiently punish Defendant. Finally, the prejudgment interest statute calculates the interest from "the date the loss was payable." Okla. Stat. Ann. tit. 36 § 3629. The bad faith conduct which gave rise to the punitive damage award in this case occurred over a substantial period of time. Not only does a punitive damage award not involve payment for a "loss," Defendant had no obligation to pay an award until the jury's verdict. Thus, we do not believe the statute supports Plaintiffs' construction.

B.

Plaintiffs also argue that the district court's determination of the date that the prejudgment interest should begin to accrue was erroneous. Under Oklahoma law, an insurer has a duty to submit a written offer of settlement or rejection of a claim within ninety days after receipt of a proof of loss. Okla. Stat. Ann. tit. 36, § 3629 (West 1990). The district court determined that the loss was payable on December 29, 1985, ninety days after Plaintiffs submitted their proof of loss to Defendant. Nonetheless, Plaintiffs argue that Defendant waived the proof of loss, and therefore they should have been awarded prejudgment interest from the date of the loss. Whether or not Defendant waived the proof of loss is a factual determination to which we give the district court's finding deference. Moreover, Plaintiffs' argument unreasonably assumes that their loss was payable on the date of the fire. Thus, we find no error in the district court's determination of the date the loss was payable.

C.

Finally, Plaintiffs argue that the district court erred in determining the amount of attorneys fees. As earlier noted, Oklahoma law allows the prevailing party in an action between an insurer and an insured to recover costs and attorneys fees. Okla. Stat. Ann. tit. 36, § 3629 (West 1990). The district court determined the amount of attorneys fees by multiplying the hours spent by Plaintiffs' attorneys by a reasonable hourly rate and then doubling this amount to account, presumably for the contingency, which is appropriate under Oklahoma law. *See Oliver's Sports Center v. National Standard Ins. Co.*, 615 P.2d 291, 294 (Okla. 1980). Notwithstanding Plaintiffs' contention that the fee should have been 40% of the total recovery in accordance with the contract between Plaintiffs and their attorney, we cannot say the district court abused its discretion in calculating the fees as it did.

AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

HAROLD MASSEY and DOROTHY MASSEY, Plaintiffs-Appellees/ Cross-Appellants, v. FARMERS INSURANCE GROUP, doing business as Truck Insurance Exchange, doing business as Truck Underwriters Association, Defendant-Appellant/ Cross-Appellee.	)	Nos. 88-2085 88-2146

ORDER

Filed March 16, 1993

Before McKAY, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, KELLY, Circuit Judges, O'CONNOR, District Judge.

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*The Honorable Earl E. O'Connor, Chief Judge, United States District Court for the District of Kansas, sitting by designation.

This matter comes on for consideration of appellant/cross-appellee's petition for rehearing and suggestion for rehearing en banc.

Appellant/cross-appellee's petition for rehearing is denied by the panel who rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Prodecure [sic], the suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By: /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

No. 92-1570

In The

Supreme Court of the United States

October Term, 1992

FARMERS INSURANCE GROUP, doing business as Truck Insurance Exchange, doing business as Truck Underwriters Association,

Petitioner,

vs.

HAROLD MASSEY and DOROTHY MASSEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Petitioner waived its right of review in failing to present the due process issue to the district court and the Court of Appeals.

II. Whether this Court should exercise jurisdiction to consider Petitioner's due process challenge when the issue was neither pressed nor passed upon below.

III. Whether the issue of the constitutionality of Oklahoma's post-verdict trial court review and appellate court review of punitive damages awards calls for an impermissible advisory opinion in that a ruling on the issue by this Court will have no effect in this action because Petitioner sought no trial court or appellate court review of the issue in this case.

IV. If the issue is properly before this Court, whether Petitioner was afforded due process in the assessment of punitive damages, when those damages were awarded under Oklahoma law requiring the district court to find, on the record, that there was clear and convincing evidence that the Petitioner was guilty of conduct evincing, wanton and reckless disregard of Respondents' rights, and which was based on instructions informing the jury that they "may" award punitive damages in an amount they believe would serve to punish Petitioner and deter others from like conduct, and which was subject to post-verdict trial court and appellate court review had Petitioner availed itself of such review.

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No. 92-1570

In The

Supreme Court of the United States

October Term, 1992

FARMERS INSURANCE GROUP, doing business as Truck Insurance Exchange, doing business as Truck Underwriters Association,

Petitioner,

vs.

HAROLD MASSEY and DOROTHY MASSEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, Harold and Dorothy Massey, respectfully request this Court deny Petitioner's writ of certiorari to review the Order and Judgment of the United States Court of Appeals for the Tenth Circuit, entered February 9, 1993, and order denying the Petition for Rehearing and Suggestion for Rehearing En Banc, entered March 16, 1993.[1]

[1] Although Petitioner characterizes its Petition for Certiorari as a request to review the Petition for Rehearing, no appeal lies from an order denying a petition for rehearing. *Conboy v. First National Bank of Jersey City*, 203 U.S. 141, 145 (1906); *Fowler v. Smiser*, 274 F.2d 335, 337 (10th Cir. 1959). An appeal *only* lies, if certiorari were granted, from the Order and Judgment of February 9, 1993.

JURISDICTION

Petitioner challenges Oklahoma's post-verdict trial court and appellate court review of the excessiveness of punitive damages awards when it sought no such review in the lower courts. This Court's jurisdiction does not extend to such hypothetical questions which call for advisory opinions. *See, Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

Additionally, for prudential reasons, this Court should refrain from exercising jurisdiction because Petitioner did not raise the due process issue below, and because the lower courts did not address the issue. *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

COUNTER-STATEMENT OF FACTS

Petitioner, Farmers Insurance Group, insured Respondents against fire loss to their home with policy limits of $75,000.00. In June of 1985, Respondents' home was destroyed by an arson fire. Petitioner determined that Respondents were not involved in the fire. Petitioner's adjuster made a preliminary finding that the house could be repaired for $45,000.00. Petitioner asked Respondents to obtain two estimates from two contractors. Respondents complied, submitting two estimates from two construction companies, both of which exceeded $100,000.00 and involved demolishing the remaining structure and completely rebuilding the house.

The insurance policy provided that in the event of a loss, Petitioner would obtain two estimates. Petitioner obtained one estimate to repair the house for $47,000.00 from First General Services of Tulsa. Contrary to Petitioner's own policy, a second estimate was not obtained. Three weeks after receiving Respondents' estimates, Petitioner notified Respondents that their policy on the damaged house, as well as a separate policy on their business, would be cancelled at the end of the month. Petitioner cancelled the policies even though its own investigation

indicated that Respondents were not at fault for the fire.[2] When Respondents would not accede to Petitioner's damage evaluation, Petitioner cutoff Respondents' additional living expense payments upon which Respondents were subsisting. Soon thereafter, Petitioner retained an

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[2] Petitioner's Senior Commercial Underwriter, John Douglas Lawrence was asked if it was fair that the Petitioner cancelled Respondents' insurance and left them unprotected. Mr. Lawrence's response was "It's not my house." (Video Deposition of John Douglas Lawrence, p.50). Specifically, Mr. Lawrence testified in pertinent part as follows:

Q. Let's talk about cabinetry. What position do you leave these folks in when you cancel their coverage under these circumstances effective July 29, 1985?
A. I think I've answered that question.
Q. You leave them in an uninsured situation, don't you?
A. Yeah.
Q. An unprotected situation, don't you?
A. Right.
Q. Do you think that's fair?
A. It's not my house.

* * *

Q. In 1985, sir, is this attitude of "it's not my house," what the insurance-buying public could expect?
A. I'll expand on the phrase "it's not my house." I don't have to deal with it. It's not my house. Other people have to deal with it. They'll have to deal with the situation themselves.
Q. Well, how were these folks to deal with the situation regarding the salvage on their house, when you cancel them on July 29 of 1985?
A. I suppose they're above age 21, and can read and write, and capable people. I understand Mr. Massey had a business on the side. I assume he's a businessman, and has some business expertise. He can figure that out.

attorney, Ray Wilburn, to represent it in the matter. Petitioner then embarked on a course of conduct which the Court of Appeals described as overt, manipulative, and abusive. (*See*, unpublished Order and Judgment of the Tenth Circuit Court of Appeals reprinted in the Appendix[3] hereto, pp. 12a, 13a, *infra*.)

The insurance policy contained a statutory appraisal clause which provides that in the event the parties fail to agree on the amount of loss, either party may invoke the appraisal process. Pursuant to Oklahoma law, the appraisal clause is required in all fire policies issued in the state. Even though the appraisal clause was part of the Petitioner's policy, and mandated by law, Petitioner trained its employees to avoid the appraisal process whenever possible. (Tr. 282-283, App. 33a-36a.)[4] Petitioner's training manual provided the following instruction to its claims personnel.

> While this provision [the appraisal provision] provides an apparently reasonable, quick and inexpensive way to resolve disputes, the company does not invoke it under any circumstances. Claims personnel are expressly warned not to call it to the attention of policy-holders and attorneys; not to discuss it when mentioned.
>
> It would seem that the appointment of a representative expert for each party, and an impartial umpire to resolve their disputes, should produce a mutually acceptable result. It does not. The result is monotonously adverse to the insurer. We avoid appraisals whenever possible.

App. 37a, 38a (brackets added). The applicable page of Petitioner's training manual is reprinted in the Appendix hereto, p. 37a, 38a *infra*.

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[3] The Appendix to this Opposition Brief will be referred to as "App."

[4] The page numbers of the trial transcript are referenced as "Tr. ___."

Notwithstanding the company policy against invoking the appraisal process or calling it to the attention of the insured, Petitioner invoked the process in this case. However, Petitioner did so for the sole purpose of manipulating and rigging the process in an attempt to pressure Respondents to accept a lesser amount for their loss. Petitioner achieved this result by hiring appraisers who were incompetent, biased, and on Petitioner's pay-roll.

The appraisal clause requires each party to select a "competent" and "disinterested" appraiser. Petitioner selected its attorney, Ray Wilburn, as its "disinterested" appraiser, despite the fact that Mr. Wilburn was already actively representing Petitioner in this matter. Moreover, Mr. Wilburn's firm did a significant amount of other legal work on Petitioner's behalf, receiving $2.4 million in fees from Petitioner for a two year period. At trial, Petitioner's representative testified that someone who had a financial relationship with Petitioner could not be disinterested. (Tr. 97, 98, 291.) After Respondents discovered Mr. Wilburn's connection with Petitioner, they objected to his capacity to be disinterested and to his competency as an appraiser. Petitioner then substituted Peter Murlowski as its "disinterested" appraiser.

Mr. Murlowski was employed by First General Services of Tulsa – the firm that had earlier given Petitioner an estimate to repair the house. Evidence at trial indicated that First General depended on insurance repair work for 95% of its business, and 25% of its business came from Petitioner. Wilburn informed Murlowski that Petitioner expected Murlowski to stand by his initial estimate. Upon inspecting the house, Murlowski maintained that the house could be repaired, but adjusted his initial estimate of approximately $47,000.00 upward by approximately $2,000.00. Mr. Murlowski testified at trial that he was not a "disinterested" appraiser, that he did not handle the appraisal properly, and that he "shirked [his] responsibility as an appraiser." (Tr. 652, 655.)

Respondents appointed Dan Simmons of Simmons-Price Construction, as their appraiser. Simmons maintained that the house would have to be completely rebuilt at a cost of approximately $100,000.00 to restore it to its pre-fire condition. Petitioner's appraiser, Murlowski, continued to maintain that the house could be repaired for approximately $49,000.00. At this point, six months had passed since Respondents' home was destroyed and Respondents had not received any payment from Petitioner for the structural property damage to their home. Consequently, Respondents had no choice but to file suit. Respondents filed suit in state district court for breach of contract and breach of the implied covenant of good faith and fair dealing.

Petitioner immediately moved the court for the appointment of an umpire, pursuant to the statutory appraisal process. At the suggestion of Petitioner's counsel, the court appointed David Lambert, a local builder who specialized in commercial building. Mr. Lambert served on the Board of Directors of two insurance companies, his expertise was in commercial, not residential construction, and in twenty-five years he had built five homes. (Tr. 1349.) Lambert inspected the property and prepared a report finding the house could be rebuilt at a cost of approximately $49,000.00, consistent with the Murlowski estimate. Although Petitioner tendered payment, Respondents rejected the settlement, dismissed their retained attorney, and, acting *pro se*, moved the court to reconsider the umpire's estimate on the basis of improprieties in the appraisal process. With their motion to reconsider pending, Respondents, upon the advice of their newly retained counsel, dismissed their state action without prejudice.

Respondents refiled their suit in Oklahoma federal district court on the basis of diversity jurisdiction. 28 U.S.C. § 1332. Following a jury trial, Respondents were awarded $75,000.00 for loss of their home, $15,000.00 for

additional living expenses, and $300,000.00 in consequential damages for Petitioner's breach of the insurance policy, as well as $4,000,000.00 in punitive damages for Petitioner's breach of the implied covenant of good faith and fair dealing. The district court further awarded Respondents attorney's fees of $376,275.00, pre-judgment interest exceeding $390,000.00, and costs totalling $44,766.00.[5]

Petitioner did not avail itself of any post-verdict review of the amount or reasonableness of the punitive damages award in the district court. Petitioner did not file a motion for new trial, application for remittitur, or motion for judgment notwithstanding the verdict.

Petitioner perfected an appeal to the Tenth Circuit Court of Appeals. The Court of Appeals affirmed finding that "the evidence at trial amply supported Plaintiffs' claim that Defendant acted in bad faith by manipulating and abusing the statutory and contractual appraisal process." App. 12a. The court noted that "substantial evidence was presented that the first appraiser appointed by Defendant was not competent, and that neither of the two appraisers appointed by Defendant were disinterested."

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[5] Petitioner's assertion that the punitive award in this case is "ten times the compensatory award" is incorrect. *See, Petition for Cert.*, p. 11. Respondents were awarded compensatory damages in the amount of $390,000.00, plus interest exceeding $390,000.00 for a total of $780,000.00. App. 5a. The punitive damages award in the amount of $4 million was thus 5.1 times the compensatory award. Further, in *Haslip*, this Court approved of Alabama appellate review of punitive awards which allowed the court to consider "all the costs of litigation" in determining if the award was excessive. When all of the costs of litigation are considered in this case, the punitive award of $4 million is 3.3 times the total actual damages of $1,201,041.00 which included attorneys' fees, costs, contract damages and interest. App. 5a. Thus, the ratio of punitive to actual damages in this case is less than the 4 to 1 ratio approved by this Court in *Haslip*.

App. 13a. The court also noted that there was direct evidence that Petitioner, through its attorneys, attempted to improperly influence the second appraiser by conveying its order that the appraiser would stand by his estimate to rebuild the house. The Court of Appeals held that "Defendant's overt failure to follow the terms of its own policy regarding the appraisal process provide[d] substantial evidence that Defendant acted unreasonably and in bad faith." App. 13a. The court further noted:

> Other evidence submitted by Plaintiffs could reasonably lead the jury to infer that Defendant attempted to pressure Plaintiffs into accepting the lesser amount to repair the house, as opposed to having it rebuilt. Defendant took an average of thirty-seven days to submit a loss for authority to settle; however, in this case, Defendant took eighty-five days to submit the contents portion of Plaintiffs' claim. A reasonable inference is that Defendant delayed payment on the contents in order to pressure Plaintiffs to settle on the structure, thereby supporting Plaintiffs' assertion that Defendant acted unreasonably and in bad faith in handling Plaintiffs' claim. Furthermore, Defendant cancelled Plaintiffs' insurance policies even though Defendant's own investigation indicated that plaintiffs were not at fault for the fire. Again, it was reasonable for the jury to infer that this cancellation was an attempt to pressure Plaintiffs into settling the loss of the structure.
>
> Finally, in addition to the evidence concerning Defendant's abuse of the appraisal process and the evidence supporting the inference that Defendant attempted to pressure Plaintiffs into accepting its offer, there was substantial evidence that Defendant's actions unreasonably withheld the payment of Plaintiffs' claim. There was testimony that the branch office's authority to settle a claim on a structure was limited to

> $40,000, and any claim in excess had to be submitted to the regional office for approval. Defendant's own estimate exceeded $40,000, yet Defendant waited until June 5, 1986, almost a year after the fire, to request settlement authority from the regional office. When authority was finally granted to settle Plaintiffs' claim for the policy limits of $75,000, Defendant never offered this amount to Plaintiffs.

App. 14a-15a.

Petitioner seeks review by this Court of the issue of whether the punitive damages award is unconstitutionally excessive under the Due Process Clause. Petitioner did not raise this issue in any briefs filed in the district court; the issue was not raised in any post-trial motions; it did not include the issue in its Docketing Statement filed with the Court of Appeals; the issue was not addressed in Petitioner's appellate briefs or supplemental briefs; and the issue was not addressed by Petitioner in oral argument before the Court of Appeals. In its unpublished Order and Judgment filed February 9, 1993, the Court of Appeals recognized that Petitioner failed to raise the issue below:

> While the Supreme Court has recognized that the due process clause may provide some limits on awarding punitive damages, *see, Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1043-46 (1991), defendant's argument is limited to an Eighth Amendment challenge.

App. 28a, n. 9.

In short, Petitioner did not raise the issue in the district court or on appeal, and no court has addressed the issue on the merits.[6] It was not until its Petition for

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[6] Petitioner artfully implies that it raised the due process argument in its Brief in Chief in the Court of Appeals when it cited *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). *See, Petition*

Rehearing in the Court of Appeals that the Petitioner finally raised the issue. The Court of Appeals denied the petition without comment.[7]

REASONS FOR DENYING CERTIORARI

I.

THE ISSUE PRESENTED WAS NEITHER DEVELOPED NOR DECIDED BELOW

This Court "has often refused to decide constitutional questions on an inadequate record." *Ellis v. Dixon*, 349 U.S. 458, 464 (1955). This Court has applied this rule without exception in cases raising due process challenges to punitive damages awards. *See, e.g., Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988).

In *Browning-Ferris*, the plaintiff brought suit in federal district court alleging violations of federal antitrust law and state tort law claims. The case was tried to a jury, which returned a compensatory award of $51,000.00 and punitive damages of $6 million. Browning-Ferris moved for judgment notwithstanding the verdict, a new trial, or remittitur. The district court denied the post-trial motions and the Second Circuit affirmed. Browning-Ferris argued in the court of appeals that the punitive damages award was unconstitutionally excessive under the Eighth

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for Cert., p. 4, n. 4. Petitioner quoted *Aetna Life* in its Opening Brief in support of an Eighth Amendment argument *only*. As recognized by the Court of Appeals, no due process or other Fourteenth Amendment argument is addressed in Petitioner's Opening Brief or Reply Brief in the Court of Appeals. App. 28a, n. 9.

[7] The failure of a petition for rehearing does not imply any judgment on the merits of the issues presented in the petition. *See, Crider v. Keohave*, 526 F.Supp. 727 (W.D.Okla. 1981); *In Re: Grand Jury Investigation*, 542 F.2d 166, 173-74 (3rd Cir. 1976); *cert. denied*, 429 U.S. 1047 (1977).

Amendment, but raised no due process argument (identical to the instant case).

On appeal to this Court, Browning-Ferris argued, for the first time, that the punitive damages award was constitutionally excessive under the Due Process Clause. This Court refused to consider the due process challenge because the record on the issue was not adequately developed:

> In the absence of a developed record on the issues relevant to this due process inquiry, we will not stretch the "clear intendment" doctrine to include this case, as we do not think that the due process question is "only an enlargement" of the Eighth Amendment inquiry. Although the due process analysis of an award of punitive damages may track closely the Eighth Amendment analysis suggested by petitioners, we shall not assume that to be the case, *and shall not attempt to decide the question in the absence of a record on the due process point developed in the district court and the Court of Appeals.*

Browning-Ferris Indus., 492 U.S. at 276, n. 23 (emphasis added).

This Court reached the same conclusion in *Bankers Life, supra*. In *Bankers Life*, the plaintiff brought suit alleging bad faith breach of an insurance contract. The jury awarded actual damages of $20,000.00 and assessed punitive damages of $1.6 million. In its appeal to the Mississippi Supreme Court, the appellant did not raise a federal constitutional chailenge to the size of the punitive damages award. Instead, appellant offered on appeal a due process challenge based on the alleged "chilling effect" of unrestricted punitive damages awards. *Bankers Life*, 486 U.S. at 75, n. 1. The Mississippi Supreme Court affirmed the jury verdict without modification.

Following the affirmance of the jury verdict, appellant filed a petition for rehearing. In its petition for rehearing, the appellant argued, for the first time, that the punitive damages award was excessive and violated due

process, equal protection and other constitutional standards. *Bankers Life*, 486 U.S. at 75.

On appeal to this Court, the appellant challenged the punitive damages award as unconstitutionally excessive under the Due Process Clause. This Court[8] held that it lacked appellate jurisdiction to consider the constitutional challenge because the "claims were not raised and passed upon in state court." *Bankers Life*, 486 U.S. at 75. This Court further noted that "any ultimate review of the question in this Court will gain the benefit of a well-developed record and a reasoned opinion on the merits by the State Supreme Court." *Bankers Life*, 486 U.S. at 72.

In the instant case, there is no "well-developed record" or "reasoned opinion on the merits" of Petitioner's due process challenge. In fact, the records which this Court found inadequate in *Browning-Ferris* and *Bankers Life* were more developed than the record in the instant case.

For example, in *Browning-Ferris*, the petitioner, at the very least, moved the district court for judgment notwithstanding the verdict, a new trial, or remittitur, arguing that the punitive damage award was excessive. Further, on appeal to the Second Circuit, *Browning-Ferris* argued that the punitive damages award was unconstitutionally excessive. In *Bankers Life*, the appellant offered on appeal a due process challenge based on the "chilling effect" of unrestricted punitive damages awards. *Bankers Life*, 486 U.S. at 75, n. 1.

In the instant case, Petitioner did not move for judgment notwithstanding the verdict, a new trial, or remittitur. Further, Petitioner never argued in the district court, or the Court of Appeals, that the punitive damages

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[8] Although the Bankers Life Court issued a plurality opinion, six justices agreed that consideration of the constitutional issues was not appropriate as a prudential matter. Justice White concluded that review was unavailable as a matter of law. Justices Stevens and Kennedy did not participate.

award was unconstitutionally excessive under the Due Process Clause. Petitioner's sole constitutional argument in the district court consisted of the following recitals made in support of its oral motion for directed verdict:

> [T]he defendant would like to, on the record, object to any punitive damages being given to the jury on the basis of the violation of the defendant's 4th, 5th, 6th, 8th, 14th Amendments, the rights thereunder.
>
> * * *
>
> And also we would object to the allowance of punitive damages against this defendant because it would be in violation of the 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution.

(Tr. 1248, 1421-22, App. 40a, 41a, and 42a.)

Notably, Petitioner's objection was to "*any* punitive damages being given to the jury," – not that the instructions or Oklahoma standards of review may result in an unconstitutionally excessive verdict.[9] (Tr. 1248, App. 40a.) Even after the jury returned its punitive damages award, Petitioner did not object to the award as excessive or unconstitutional.

It was not until its Petition for Rehearing in the Tenth Circuit that Petitioner raised the issue of whether the punitive damages award was unconstitutionally excessive under the Due Process Clause. In *Bankers Life, supra,* this Court held that a due process argument made for the

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[9] Since Petitioner's trial court objection was that the issue of punitive damages should not be presented to the jury – as opposed to the argument that the jury's award was unconstitutionally excessive, Petitioner's reliance on *Haslip* is misplaced. *Haslip* does not concern the standards governing submission of punitive damages to a jury. Instead, it addresses the restraints that must be placed on the jury's consideration of damages and post-verdict review. *See, Haslip,* 111 S.Ct. at 1044-46.

first time in a petition for rehearing comes too late for consideration by this Court.

A more fundamental procedural defect resulting from Petitioner's failure to seek post-verdict relief in the district court is that there is no ruling by the lower courts for this Court to review. In *Browning-Ferris*, this Court recognized that its role is not to review directly the issue of the excessiveness of a verdict:

> It is not our role to review directly the award for excessiveness, or to substitute our judgment for that of the jury. Rather, our only inquiry is whether the Court of Appeals erred in finding that the district court did not abuse its discretion in refusing to grant petitioner's motion, under Federal Rules of Civil Procedure 59, for a new trial or remittitur.

Browning-Ferris, 492 U.S. at 276.

The necessary implication of the above rule is that there can be no appellate review if the district court was not given an opportunity to exercise its discretion on a motion for new trial or remittitur. Since there was no motion for new trial or remittitur in this case, the Court of Appeals had no district court ruling to review and, in turn, this Court has no Court of Appeals ruling on the issue to review.

II.

CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER WAIVED THE ISSUE OF WHETHER THE PUNITIVE DAMAGES AWARD IS UNCONSTITUTIONALLY EXCESSIVE UNDER THE DUE PROCESS CLAUSE

The Tenth Circuit follows "the general rule that an appellate court will not consider an issue raised for the first time on appeal." *See, Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970 (10th Cir. 1991). The *Hicks* court noted that "[e]xceptions to this rule are rare and generally limited to cases where the jurisdiction of a court to hear a case is questioned, sovereign immunity is raised, or when the

appellate court feels it must resolve a question of law to prevent a miscarriage of justice." *Id.* The court noted that the policies behind the general rule are the facilitation accorded appellate review by having the district court first consider an issue and the prevention of unfair surprise to the opponent.

The most recent Tenth Circuit case applying the above-noted rule is *Scheidt v. Klein*, 956 F.2d 963 (10th Cir. 1992). In *Scheidt*, the defendant argued, for the first time on appeal, that the award of punitive damages was excessive in light of a Florida statute which created a presumption that any award of punitive damages over three times the amount of actual damages is excessive. The Tenth Circuit refused to consider the issue noting as follows:

> More importantly, defendant never raised the issue below, despite ample opportunity to do so, both in his request for remittitur and following the district court's orders conditionally granting and then effecting the requested reduction with respect to compensatory damages without any adjustment of punitive damages. Under the circumstances we deem the point waived.

956 F.2d at 970. *See also, Natural Gas Co. v. Hegler*, 818 F.2d 730, 734 (10th Cir. 1987) ("This position did not surface in the trial court. . . . Northern [plaintiff] made no request for different findings post trial, and we will not consider the contention now.") *Copp v. Unified School Dist. No. 501*, 882 F.2d 1547, 1553 (10th Cir. 1989) (failure to challenge issue in district court constitutes waiver of issue on appeal); *FDIC v. Liberty Nat'l Bank & Trust*, 806 F.2d 961, 963, n. 1 (10th Cir. 1986) (court need not consider issue not raised on appeal); *Bledsoe v. Garcia*, 742 F.2d 1237, 1244 (10th Cir. 1984) (issue not raised on appeal deemed waived).

In this case, since Petitioner did not raise the issue of whether the punitive damages award was unconstitutionally excessive in the district court, Petitioner waived

appellate review of the issue. *See, e.g., Electro Services, Inc. v. Exide Corp.*, 847 F.2d 1524 (11th Cir. 1988).[10]

Additionally, the Tenth Circuit follows the rule that issues on appeal are waived unless raised in the Docketing Statement and argued in the briefs. *Bledsoe*, 742 F.2d at 1244; *Whitehead v. Salver*, 346 F.2d 207, 209, n. 2 (10th Cir. 1965); *Suggs v. State Farm Fire & Cas. Co.*, 833 F.2d 883, 886, n. 4 (10th Cir. 1987) *cert. denied*, 486 U.S. 1007 (1988) (issue raised in Docketing Statement but not briefed is deemed waived). In the instant case, Petitioner did not raise the due process issue in its Docketing Statement, and failed to argue the issue in its appellate briefs.[11]

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[10] In *Electro Services, Inc.*, the plaintiff was awarded $3.5 million in punitive damages. The defendant did not move for new trial on the grounds that the verdict was excessive. On appeal, the defendant argued that the punitive damages award was unconstitutionally excessive. *Id.* at 1530. The Eleventh Circuit held that the defendant's failure to raise the issue in a motion for new trial precluded appellate review of the excessiveness issue. The appellate court noted that in the absence of a ruling on the issue by the district court, there was "no basis for reviewing the trial court's exercise of discretion and therefore no basis for reviewing the adequacy of damages." *Id.* at 1530.

[11] Petitioner suggests that its failure to raise the due process issue below should be excused because when it filed its Brief in Chief on appeal "the constitutionality of punitive damages was in tremendous flux" and because "[t]his Court decided *Haslip* . . . after completion of briefing and oral argument . . . in this case." *See, Petition for Cert.*, p. 4, n. 4. This Court made it clear in *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986), that the constitutionality of punitive damages awards was an important issue. In the majority opinion, written by Chief Justice Burger, this court noted that "[t]hese arguments [due process arguments] raise important issues which, in an appropriate setting, must be resolved." *Lavoie*, 475 U.S. at 828-829. The present action was filed in the District Court on June 25, 1986, approximately one year after this Court decided *Lavoie*. This Court revisited the due process issue in *Bankers Life, supra. Bankers Life* was decided on May 16, 1988, some six months prior to the date

(App. 28a, n. 9.) Thus, Petitioner waived appellate review of the issue.

Similarly, Petitioner has waived the argument that the jury instructions on punitive damages were constitutionally inadequate. The basis of Petitioner's trial court objection was that the issue of punitive damages should not be presented to the jury, – not that the jury's award was excessive, assuming punitive damages were justified. Once the district court ruled that punitive damages would be submitted to the jury, Petitioner did not object to the substance of the instructions on punitive damages. (Tr. 1430, App. 37a.) In *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257 (1987), this Court noted that it will not decide questions raised for the first time on appeal and that this rule "has special force where the party seeking to argue the issue has failed to object to a jury instruction" on the issue. 480 U.S. at 259.

In applying the above-noted law to the instant case, it is clear that Petitioner has waived appellate review of the due process issue. Accordingly, certiorari should be denied.

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in which Petitioner filed its Brief in Chief in the Court of Appeals (Brief in Chief filed in November, 1988). In *Bankers Life*, this Court again recognized due process concerns with punitive damages awards, but refused to consider the issue in the absence of a "well-developed record and a reasoned opinion on the merits" in the lower courts. *Bankers Life, supra*, 486 U.S. at 75. Based on *Lavoie* and *Bankers Life*, Petitioner's suggestion that it was not aware of the due process issue is unavailing. Equally unavailing is Petitioner's suggestion that it did not raise the due process issue in the Court of Appeals because this Court decided *Haslip* after completion of briefing and oral argument. This Court decided *Haslip* on March 4, 1991. The Court of Appeals entered its Order and Judgment in this case two years later, on February 9, 1993. At no time during this two year period did Petitioner seek leave to supplement its appellate briefs with the *Haslip* decision. *See*, Fed.R.App.P. 28(j), which allows a party to submit supplemental authority to the Court of Appeals "after oral argument but before decision."

III.

THE RAISING OF THE DUE PROCESS ISSUE FOR THE FIRST TIME ON PETITION FOR REHEARING DOES NOT SATISFY THIS COURT'S "PRESSED OR PASSED" UPON BELOW RULE

This Court's traditional rule precludes a grant of certiorari when "the question presented was not pressed or passed upon below." *United States v. Williams*, ___ U.S. ___, 112 S.Ct. 1735, 1737 (1992); *Youakim v. Miller*, 425 U.S. 231 (1976). This rule applies in cases coming from federal as well as state courts. *See, e.g. Hathorn v. Lovorn*, 457 U.S. 255 (1982) (state court); *Williams, supra.*, (federal court). "It is only in exceptional cases coming [to this Court] from the federal courts that questions not pressed or passed upon below are reviewed." *Youakim*, 425 U.S. at 234.

In this case, Petitioner does not argue that this is an "exceptional case." Instead, Petitioner argues that it satisfied the pressed or passed upon below rule when it raised the due process issue for the first time in its petition for rehearing in the Court of Appeals. As more fully discussed below, the raising of a previously waived issue in a petition for rehearing does not satisfy the rule.

The purpose of a petition for rehearing is to bring to the Court's attention "points of law or fact which in the opinion of the petitioner the Court has overlooked or misapprehended. . . . " Fed.R.App.P. 40. On rehearing, an appellant cannot raise questions for the first time which were waived on original hearing. *See, Marion Steam Shovel Co. v. Bertino*, 82 F.2d 945 (8th Cir. 1936), *cert. denied* 299 U.S. 556 (1936); *Anderson v. Knox*, 300 F.2d 296 (9th Cir. 1962), *cert. denied* 370 U.S. 915 (1962). In the instant case, the Tenth Circuit recognized that Petitioner did not raise the due process issue on appeal. App. 28a, n. 9. The failure to do so resulted in the issue being waived, and thus, the issue was not a proper subject for rehearing. As a result, the issue was never "pressed or passed" upon below.

The essence of Petitioner's argument is that an issue previously waived on appeal can be resurrected simply by raising the issue on rehearing. This argument is contrary to Tenth Circuit rules which provide that issues are deemed waived if not raised in the Docketing Statement and fully briefed. The argument is also contrary to established rules of appellate practice which generally require that an issue be actually raised and "debated" by the parties in order to be preserved. *See, Williams*, 112 S.Ct. at 1748, n. 4. Generally, an issue raised in a petition for rehearing is not "debated" in the Court of Appeals because "[n]o answer to a petition for rehearing will be received unless requested by the Court." Fed.R.App.P. 40. In this case, the Tenth Circuit did not instruct Respondents to respond to the Petition for Rehearing. As a result, the due process issue was never developed through the adversarial process in the Court of Appeals.

In support of its contention that the due process issue is properly before this Court, Petitioner relies on *Williams, supra*. *Williams* is inapposite. The issue presented on certiorari in *Williams* was actually decided by the Court of Appeals. *Williams*, 112 S.Ct. at 1740 (noting that "[t]here is no doubt in the present case that the Tenth Circuit decided the crucial issue"). In the instant case, the Court of Appeals did not decide the crucial issue presented to this Court for review.

Petitioner attempts to play-down the serious prudential and jurisdictional defects in this case by merely alluding to these issues in footnote 5 of its Petition for A Writ of Certiorari. In footnote 5, Petitioner states that "[i]t is sufficient for the purpose of preserving an issue for this Court's review of a federal court decision that the issue was raised in the Petition for Rehearing to the Court of Appeals." *See, Petition for Cert.*, p. 5, n. 5. Petitioner cites no authority for this proposition – but does cite *Williams, supra*, for the proposition that this Court's "traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below'." This is a correct quote from *Williams*. However,

this Court in *Williams* did not address the question whether a due process challenge made for the first time in a petition for rehearing is sufficiently "pressed" in the district court to satisfy this Court's prudential rules. *Bankers Life, supra,* suggests that it is not.[12]

In footnote 5, Petitioner also suggests that *United States v. Lovasco,* 431 U.S. 783, 788 (1977), supports its assertion that an issue raised for the first time in a petition for rehearing satisfies this Court's prudential and jurisdictional rules. In *Lovasco,* the petitioner failed to raise a procedural issue in the district court or the Court of Appeals. This Court held that "[a]bsent exceptional circumstances, we will not review it here." 431 U.S. at 788, n. 7. In *dictum,* this Court noted that "the Government's petition for rehearing did not squarely raise the procedural issue as an alternative ground for rehearing the case." *Id.* This Court did not address the question of whether the issue would have been preserved for review had it been properly raised in the petition for rehearing. *Id.*

IV.

THIS COURT SHOULD DENY CERTIORARI BECAUSE THE PUNITIVE DAMAGES AWARD IS NOT VIOLATIVE OF DUE PROCESS AND IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN *HASLIP*

It is well established that "a law fails to meet the requirements of the Due Process Clause if it is so vague

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[12] The *Bankers Life* case came to this Court from the Mississippi Supreme Court. Although the "pressed or passed" upon predicate for the exercise of this Court's jurisdiction is of special importance in determining this Court's power to review state court judgments, there is no distinction between the requirements of the rule in cases coming to this Court from state and federal courts. *Williams,* 112 S.Ct. at 1748, n. 6. In other words, if raising an issue for the first time in a Petition for Rehearing in state court does not satisfy the "pressed upon" below requirement, the raising of an issue for the first time in a Petition for Rehearing in federal court also does not satisfy the rule. *Id.*

and standardless that it leaves . . . judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Giaccio v. Pennsylvania*, 382 U.S. 399, 402-03 (1966).

Petitioner's due process challenge in the instant case is based on this Court's decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. ___, 111 S.Ct. 1032 (1991). In *Haslip*, this Court reviewed Alabama's standards for assessing and reviewing punitive damages awards to determine if the standards satisfy due process. This Court decided that Alabama's standards satisfied due process. In reviewing the award, however, this Court indicated that punitive damages awards are not immune from due process constraints. This Court declined to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Id.* at 1043. This Court did say, however, "that general concerns of reasonableness and adequate guidance from the court when the case is tried to the jury properly enter into the constitutional calculus." *Id.* Having rejected a bright line test in favor of a "totality of the circumstances" approach, this Court considered three procedural matters in its "constitutional calculus": (1) the discretion given the jury; (2) trial court scrutiny of punitive awards; and (3) appellate court review of punitive awards.

A. The Instructions Given to the Jury Provided Reasonable Constraints on the Jury's Discretion.

In considering the discretion accorded the *Haslip* jury in assessing punitive damages, this Court focused on the jury instructions. The *Haslip* trial court expressly described for the jury the purpose of punitive damages, namely, "not to compensate the plaintiff for any injury", but "to punish the defendant" and "for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future." *Id.* at

1044 (brackets supplied by court). The instructions further provided that if punitive damages were to be awarded, the jury "must take into consideration the character and the degree of the wrong as shown by the evidence and necessity of preventing similar wrong." *Id.* This Court held that the instructions properly limited the jury's discretion because the instructions:

> Enlightened the jury as to the punitive damages nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.

Id. at 1044.

In this case, the court instructed the jury that if Petitioner's conduct "amounted to oppression, gross negligence, or willful and wanton conduct which was in reckless disregard of plaintiffs' rights, then in addition to actual damages to which you find plaintiffs entitled, you may award plaintiffs an additional amount as exemplary or punitive damages." (Tr. 1500, App. 45a.) The court further instructed the jury that the amount of punitive damages awarded should be an amount in which the jury "believe[s] will serve to punish the defendant and for the sake of example to deter other [sic] from like conduct." (Tr. 1500, App. 45a.)

Contrary to Petitioner's assertion, there is no substantive difference between the instruction on punitive damages given in the instant case and the one approved by this Court in *Haslip*. As in *Haslip*, the district court imposed limitations on the exercise of the jury's discretion to award punitive damages. The court instructed the jury that the purpose of punitive damages was to punish Petitioner and to deter others from similar conduct. Significantly, the court also said that the jury "*may*" impose punitive damages. The word "may" cannot be taken as "must". It was clear from the instructions that the jury could refuse to award punitive damages. Respondent *never* objected, at trial, to the *form* of the instruction given. (Tr. 1430, App. 44a.)

Accordingly, as in *Haslip*, the instructions in the instant case "enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory." *Id* at 1044. Thus, the instructions placed reasonable constraints on the jury, thereby satisfying the requirements of due process. This Court in *Haslip* next considered the trial court's scrutiny of punitive awards.

B. Oklahoma's Trial Court Review of Punitive Damages Is Not Violative of Due Process and Is Adequate Under *Haslip*

Under Oklahoma law, punitive damages are available only when a defendant has been found "guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice." Okla.Stat.Ann. tit. 23 § 9. (Section 9 reprinted in App. hereto, p. 46a, *infra*.) The amount of punitive damages that may be awarded, however, is limited to an amount not exceeding actual damages awarded unless:

> [A]t the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed,. . . .

Id., see also, John A. Henry & Co. L.T.D v. T.G.& Y. Stores Co., 941 F.2d 1068, 1073 (10th Cir. 1991). The "clear and convincing evidence" standard set forth in Oklahoma's punitive damages statute requires the "trial court to make a determination [based on clear and convincing evidence] of the prima facie sufficiency of the plaintiff's evidence of fraud, malice, or the like, before an award of punitive damages in excess of actual damages may be allowed." *Shuman v. Laverne Farms CO-OP*, 809 P.2d 76, 78

(Okla.App. 1991) (brackets added). If the trial court does not find clear and convincing evidence of the conduct set forth in the punitive damages statute, the jury is instructed that punitive damages shall not exceed actual damages. *John A. Henry & Co., L.T.D.*, 941 F.2d at 1073.

Unlike the Oklahoma system, the Alabama system approved by this Court in *Haslip* does not require the trial court to make a pre-verdict assessment of the evidence and limit the amount of punitive damages based on that assessment. Moreover, the Alabama punitive damages system, unlike the Oklahoma system, does not require the trial court to make an independent pre-verdict finding, *based on clear and convincing evidence*, that the defendant is guilty of culpable conduct. In these respects, the Oklahoma punitive damages statute provides constraints which exceed those approved by this Court in *Haslip*. Further, the Alabama system allows the jury and trial court to assess punitive damages based on the lesser, "reasonably satisfied from the evidence," standard of proof. *Id.* at 1046, n. 11. Although the defendant in *Haslip* argued that a standard of "clear and convincing evidence" was required by the Due Process Clause, this Court rejected that argument holding that the lesser standard is constitutionally sufficient. *Id.* This Court, however, cited with approval those punitive damages award systems, like Oklahoma's, that impose a standard of clear and convincing evidence. *Id.*

Unlike the Alabama system, Oklahoma trial courts are not required to make a post-verdict record of their review of the excessiveness of punitive damages awards. However, Oklahoma's punitive damages statute does require the trial court to make a pre-verdict finding, *on the record*, concerning the Plaintiff's entitlement to punitive damages. The Oklahoma statute provides that the trial court "shall find, *on the record* . . . that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice," before punitive damages may exceed actual damages. In the

instant case, the district court made such a finding.[13] (Tr. 1422, App. 42a.) Although this is a pre-verdict analysis, it results in substantial post-verdict constraints on the discretion allowed the jury in fixing the amount of punitive damages.

Under Oklahoma law, post-verdict trial court review of punitive damages awards is available through motions for new trial, judgment notwithstanding the verdict, and remittitur. The trial court reviews the award to determine if it is "grossly excessive or the result of the jury's passion, prejudice or improper sympathy."[14] *Chandler v. Denton*, 741 P.2d 855, 868 (Okla. 1987). The Oklahoma appellate courts have provided reasonable guidelines for the trial courts to follow. In *Thiry v. Armstrong Ind.*, 661 P.2d 515 (Okla. 1983), the court noted that "[t]he trial judge must exercise considerable control to avoid excessive punitive damage verdicts since the goal is to punish

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[13] The court made the following finding: "Well, no one has urged the Court to, but it wasn't mentioned earlier. And I will make the finding concerning Title 23 Oklahoma Statute, Section 9. I find that there is certainly clear and convincing evidence that the defendant is guilty of conduct evincing the wanton and reckless disregard for the rights of others.
And consequently, I'm going to submit to the jury punitive damages, and leave it open-ended. (Tr. 1422, App. 42a.)

[14] Petitioner contends that Oklahoma's standard of review which requires the trial court to determine if the award is "grossly excessive or the result of the jury's passion, prejudice or improper sympathy" violates due process. *See, Petition for Cert.*, p. 13. An identical argument was rejected by the Fifth Circuit in *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1098 (5th Cir. 1991) ("We first reject *Celotex's* implication that a 'passion and prejudice' standard of review can never withstand constitutional scrutiny after *Haslip*.") This Court recently denied certiorari in *Glasscock*. *See, Celotex v. Glasscock*, 112 S.Ct. 1778 (1992).

and deter, not bankrupt and destroy." *Id.* at 517. In *Silkwood v. Kerr-McGee Corp.*, 769 P.2d 1451, 1460 (10th Cir. 1985), the court set forth the following guidelines:

> Under Oklahoma law, although such factors as risks created and deterrent effect may be considered in determining a punitive damages award and the amount of punitive damages need bear no relation to the amount of actual damages awarded, the analysis is not open-ended. Rather, it must be disciplined by references to injuries actually caused by the defendant, both to the plaintiff and to society generally.

Silkwood, 941 F.2d at 1068.

As this Court noted in *Haslip*, "[a]s long as the discretion is exercised within reasonable constraints, due process is satisfied." *Haslip*, 111 S.Ct. at 1044. The above-noted constraints set forth in Oklahoma's punitive damages statute, and the review of such awards by Oklahoma trial courts, provide meaningful and adequate constraints on the discretion accorded the jury and the trial court. Thus, Oklahoma's trial court review of punitive awards is not violative of due process and is not in conflict with this Court's decision in *Haslip*.

C. Oklahoma's Appellate Court Review of Punitive Damages Is Not Violative of Due Process and Is Adequate Under *Haslip*

In *Haslip*, this Court recognized that appellate court review "provides an additional check on the jury's or trial court's discretion." Under the Alabama system approved by this Court in *Haslip*, the following could be taken into consideration by the appellate court in determining whether the punitive award was excessive or inadequate.

> (a) whether there is a reasonable relationship between the punitive damages awarded and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of

> the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the "financial position" of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Haslip, 111 S.Ct. at 1045.

In Oklahoma[15], appellate courts review punitive awards to determine if they are "grossly excessive or the result of the jury's passion, prejudice, or improper sympathy." *Chandler v. Denton*, 741 P.2d 855, 863 (Okla. 1987); *Buzzard v. Farmers Ins. Co., Inc.*, 824 P.2d 1105, 1115 (Okla. 1991). In making this determination, Oklahoma appellate courts may consider many of the same factors considered by the Alabama appellate courts.

Identical to the Alabama system, Oklahoma appellate courts may consider the harm caused to society by the defendant's wrongful actions. *Timmons v. Royal Globe Ins.*

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[15] "Although the proper justification for punitive damages is a matter of state law, the determination of whether a jury award of punitive damages is excessive is a matter of federal law." *The Post Office v. Portec, Inc.*, 913 F.2d 802, 809 (10th Cir. 1990); *Donovan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 649-50 (1977). The Tenth Circuit has set forth the following factors to be considered in determining whether an award of punitive damages is excessive: (1) the nature of the act which caused the injury; (2) the economic status of the defendant; and (3) the deterrent effect of the award on others. *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152 (10th Cir. 1983), *cert. denied*, 112 S.Ct. 1194 (1992).

Co., 653 P.2d 907, 918 (Okla. 1982). Oklahoma appellate courts, like the Alabama courts, may also consider whether the penalty "directly attacks the profit incentive" generated by the defendant's misconduct. *Thiry v. Armstrong World Indus.*, 661 P.2d 515 (Okla. 1983). The *Thiry* court stressed that the penalty should "match the misconduct but of necessity should relate to the wealth of the wrongdoer." *Id.* at 518. Identical to the Alabama system, Oklahoma appellate courts consider the financial position of the defendant. *Id.*

Although Oklahoma does not require the amount of punitive damages to be in a particular ratio to the amount of actual damages, Oklahoma appellate courts may consider as a factor in determining the correctness of a punitive award the amount in actual controversy. *Basden v. Mills*, 472 P.2d 889, 896 (Okla. 1970). The appellate court may also consider whether "the combined effect [of the evidence] . . . influenced the jury so as to create an improper sympathetic response of a damage award larger than reason dictates to be necessary to deter such conduct in [the] defendant and others similarly situated." *Timmons*, 653 P.2d at 918. The Oklahoma Supreme Court has stressed that punitive damages are for the benefit of society, and should not be used to obtain a windfall for the individual plaintiff. *Thiry*, 661 P.2d at 518. If an Oklahoma appellate court determines a punitive award is "so out of proportion as to be unconscionable, a conditional affirmance, subject to remittitur, may be required." *Chandler*, 741 P.2d at 868.

Contrary to Petitioner's assertion, Oklahoma law does allow appellate courts to make an independent determination as to whether a punitive damages award exceeds the amount necessary to achieve society's goals of punishment and deterrence. *See, e.g., Thiry*, 661 P.2d at 518, ("In order to achieve the goal of deterrence, the penalty should increase as the magnitude of the hazard to the public increases."); *Buzzard*, 842 P.2d at 1115. ("The focus is the harm caused to society by the defendant's wrongful actions.").

Although appellate review of punitive damages awards in Oklahoma is not identical to that of Alabama, the difference does not result in a due process violation. Oklahoma appellate review coupled with the additional constraints imposed by Oklahoma's punitive damages statute (i.e. "cap" on amount of punitive damages in absence of clear and convincing evidence) ensures that punitive awards are reasonable in amount and rational in light of their purpose to punish what has occurred and to deter its repetition.[16] *Haslip*, 111 S.Ct. 1032; *Thiry*, 661 P.2d

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[16] Petitioner contends that appellate review of punitive damages under Oklahoma law is a "toothless procedure." *Petition for Cert.* p. 11. Petitioner knows better. In another insurance bad faith case, *Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105 (Okla. 1991), the jury awarded punitive damages against the *Petitioner* in the amount of $2 million dollars. In that case, Petitioner refused to pay its insured uninsured motorist coverage until the liability carrier paid the insured, then when the liability carrier paid the insured, Petitioner actually denied coverage because of the insured's settlement with the liability carrier. Notwithstanding this egregious conduct, the Oklahoma Supreme Court ordered a remittitur in the amount of $1.6 million, thereby reducing the punitive award to $400,000.00.

Buzzard is not an isolated case. The standards provided by Oklahoma law for punitive award review have real effect when applied by the Oklahoma appellate courts. *See, e.g. Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 909 (Okla. 1982) (punitive damages award of $3 million reduced to $1.5 million); *Chandler v. Denton*, 741 P.2d 855, 868 (Okla. 1987) (punitive damages award of $500,000.00 reduced to $250,000.00); *Slocum v. Phillips Petroleum Co.*, 678 P.2d 716, 720 (Okla. 1983) (complete reversal of punitive award); *Basden v. Mills*, 472 P.2d 889 (Okla. 1970) (punitive damages award of $25,000.00 reduced to $10,000.00); *Spaeth v. Union Oil Co. of California*, 710 F.2d 1455, 1460 (10th Cir. 1983) (remand to trial court ordering "a remittitur of a substantial amount with due consideration to the amount needed to punish the defendant in the particular circumstances"); *Shuman*

at 518. Thus, Oklahoma's standards for awarding and review of punitive awards does not violate due process and is not in conflict with this Court's decision in *Haslip*.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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v. Laverne Farmers CO-OP, 809 P.2d 76 (Okla. App. 1991) (reduction of punitive award to amount of actual damages.)

A very recent case, *Scribner v. Hillcrest Medical Center*, No. 75,446, cons. with No. 76,604 (Okla.App., Sept. 18, 1992), *petition for cert. denied* (Okla.Sup.Ct., March 17, 1993) (released for publication but not yet published), indicates that Oklahoma's appellate court review of punitive awards strictly follows this Court's guidance in *Haslip*. In *Scribner*, the Oklahoma Court of Appeals reduced the punitive damages award of $10 million to $5 million. The *Scribner* opinion is set forth in the App. hereto at pp. 47a-69a, *infra*.

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

HAROLD MASSEY and DOROTHY MASSEY, Plaintiffs-Appellees and Cross-Appellants, vs. FARMERS INSURANCE GROUP, doing business as Truck Insurance Exchange, doing business as Truck Underwriters Association, Defendant-Appellant and Cross-Appellee.	)	Nos. 88-2085 88-2146 (D.C. No. 87-324-C) (E.D. Okla.) (Filed Feb. 09, 1993)

ORDER AND JUDGMENT*

Before TACHA and BALDOCK, Circuit Judges, and O'CONNOR, District Judge.**

This diversity case arising in Oklahoma involves claims for breach of an insurance contract and breach of

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** The Honorable Earl E. O'Connor, Chief Judge, United States District Court for the District of Kansas, sitting by designation.

the implied covenant of good faith and fair dealing. Following a jury trial, a judgment was entered in favor of Plaintiffs-Appellees Harold and Dorothy Massey, and they were awarded compensatory damages of $375,000, punitive damages of $4,000.000, prejudgment interest, attorneys fees and costs. Defendant-Appellant Farmers Insurance Group appeals from this judgment raising a number of alleged errors. Plaintiffs cross-appeal the district court's calculation of prejudgment interest and attorneys fees. We have jurisdiction under 28 U.S.C. § 1291.

I.

This case arose out of an arson fire at Plaintiffs' home. Defendant insured Plaintiffs against fire loss to their home with policy limits of $75,000. Defendant's adjuster, Joe Delacerda, determined that Plaintiffs were not involved in the arson. Delacerda made a preliminary finding that the house could be repaired for approximately $45,000. Delacerda asked Mr. Massey to obtain estimates from two contractors. Mr. Massey obtained estimates from Simon-Price Construction and Gerald Eaves Construction which he submitted to Defendant. Both of these estimates exceeded $100,000 and involved demolishing the remaining structure and completely rebuilding the house.

After receiving Plaintiffs' estimates Defendant adjusted its loss reserves up to the policy limits. Delacerda then obtained an estimate to repair the house for approximately $47,000 from First General Services of Tulsa. Contrary to Defendant's own policy, Delacerda did not obtain a second estimate. Three weeks after receiving

Plaintiffs' estimates, Defendant notified Plaintiffs that their policy on the damaged house as well as a separate policy on Plaintiffs' business would be cancelled effective at the end of the month. Soon thereafter, Defendant retained an attorney, Ray Wilburn, to represent it in the matter.

The central dispute at this point was whether repairing the house would restore it to its prefire condition or whether the house would have to be torn down and completely rebuilt to restore it to its prefire condition. With the parties at an impasse, Defendant invoked the statutory appraisal clause of the policy. *See* Okla. Stat. Ann. tit. 36, § 4803 (West 1990). This clause provides that in the event that the parties fail to agree on the amount of loss, either party may invoke the appraisal process. Once this process is invoked, each party is required to select a competent and disinterested appraiser. The appraisers then select an umpire, and, if the appraisers cannot agree on an umpire, a court shall select the umpire. Each appraiser then submits an itemized appraisal of the loss. The appraisers' differences are submitted to the umpire who then determines the amount of the loss. Each party is expected to bear the cost of its own appraiser, and the parties equally share the cost of the umpire. Plaintiffs offered evidence at trial that it was contrary to Defendant's company policy to invoke the appraisal process, although Defendant sharply contested this fact claiming that the training manual upon which Plaintiffs relied was outdated and no longer reflected company policy.

Defendant initially appointed attorney Wilburn as its "disinterested" appraiser despite the fact that Wilburn

was already actively representing Defendant as its attorney in this matter. Moreover, Wilburn's firm did a significant amount of other legal work on Defendant's behalf, receiving over $2.4 million in fees from Defendant for a two-year period. After Plaintiffs objected to Wilburn's capacity to be disinterested and to his competency as an appraiser, Defendant substituted Peter Murlowski as their appraiser. Murlowski was employed by First General Services of Tulsa – the firm that had earlier given Defendant an estimate to repair the house. Evidence at trial indicated that First General depended on insurance repair work for 95% of its business, and 25% of its business came from Defendant. Wilburn informed Murlowski that Defendant expected Murlowski to stand by his initial estimate. Upon inspecting the house, Murlowski maintained that the house could be repaired but adjusted his initial estimate of approximately $47,000 upward by approximately $2,000.

Plaintiffs appointed Dan Simmons of Simmons-Price Construction, which had prepared one of Plaintiffs' earlier estimates to rebuild the house. Simmons maintained that the house would have to be completely rebuilt at a cost of approximately $100,000 to restore it to its prefire condition. Thus, Simmons and Murlowski were unable to agree, and neither appraiser suggested the appointment of an umpire.

Plaintiffs filed suit in state district court for breach of contract and breach of the implied covenant of good faith and fair dealing. Subsequently, Defendant moved the court for the appointment of an umpire pursuant to the statutory appraisal process. At the suggestion of Defendant's counsel, the court appointed David Lambert, a

local builder who specialized in commercial building and served on the Board of Directors of two insurance companies. Lambert inspected the property and received incomplete estimates from Murlowski and Simmons. The Murlowski estimate did not have any dollar values placed on it, and the Simmons estimate was merely three lines rather than the itemized estimate he had earlier provided to Defendant. Lambert never attempted to negotiate a compromise between Murlowski and Simmons. Rather, Lambert prepared a report finding the house could be rebuilt at a cost of approximately $49,000, consistent with the Murlowski estimate. Although Defendant tendered payment, Plaintiffs rejected the settlement, dismissed their retained attorney, and, acting *pro se*, moved the court to reconsider the umpire's estimate on the basis of alleged improprieties in the appraisal process. With their motion to reconsider pending, Plaintiffs, upon the advice of their newly retained counsel, dismissed their state action without prejudice under Okla. Stat. Ann. tit. 12, § 683 (West 1988).

Plaintiffs refiled their suit in the Oklahoma federal district court on the basis of diversity jurisdiction. 28 U.S.C. § 1332. Following a jury trial, Plaintiffs were awarded $75,000 for loss of their home, $15,000 for additional living expenses and $300,000 in consequential damages for Defendant's breach of the insurance policy as well as $4,000,000 in punitive damages for Defendant's breach of the implied covenant of good faith and fair dealing. The district court further awarded Plaintiffs attorney fees of $376,275, prejudgment interest exceeding $390,000 and costs totalling $44,766.

II.

Among its many contentions, Defendant initially asserts that the state court umpire's damage appraisal of Plaintiffs' home is conclusive on the issue of the amount necessary to restore the dwelling to its prefire condition, and thus fixed the damages due on the dwelling. Defendant further asserts that if the umpire's award is valid, then Defendant could not have acted in bad faith because Plaintiffs' case rests upon Defendant's purportedly improper handling of the appraisal process.

In the interest of comity, and pursuant to Okla. Stat. Ann. tit. 20, §§ 1602-1605 (West Supp. 1990), we certified the following question to the Oklahoma Supreme Court:

> Under Oklahoma law, what is the preclusive effect of a court-appointed umpire's damage appraisal under a statutorily-mandated provision of a fire insurance policy, where the insured, as of right, dismisses without prejudice an initial lawsuit without challenging the umpire's appraisal and, thereafter, institutes a subsequent lawsuit on the same cause of action in another court?

Massey v. Farmers Ins. Group, No. 88-2085, slip op. at 2 (10th Cir. Mar. 26, 1990) (certification order). The Oklahoma Supreme Court has since answered the question by holding that "a court-appointed umpire's damage appraisal under the statutorily-mandated provision of a fire insurance policy, [Okla. Stat. Ann. tit. 36, § 4803(G) (West 1990)], has no preclusive effect upon the party who did not demand the appraisal process." *Massey v. Farmers Ins. Group*, 837 P.2d 880, 885 (Okla. 1992). Accordingly,

because Plaintiffs did not demand the appraisal process, the earlier appraisal by the state court appointed umpire has no preclusive effect on Plaintiffs' present action. Therefore, the district court did not err in denying Defendant's motion for summary judgment and motion for a directed verdict on this issue.

III.

Defendant raises three challenges to the sufficiency of the evidence: (A) the evidence was insufficient to support the contractual damage award for additional living expenses; (B) the evidence was insufficient for the jury to find that Defendant breached the implied covenant of good faith and fair dealing; and (C) the evidence was insufficient for the jury to find that Defendant acted with fraud, malice or oppression. We view the evidence and all reasonable inferences therefrom in the light most favorable to Plaintiffs and can reverse only when it is clear that reasonable minds could not differ on the conclusion. *Pytlik v. Professional Resources, Ltd.*, 887 F.2d 1371, 1380 (10th Cir. 1989); *McKinney v. Gannett Co., Inc.*, 817 F.2d 659, 663 (10th Cir. 1987).

A.

The jury awarded Plaintiffs $15,000 in additional living expenses. Such expenses were covered under a provision of the policy which read as follows:

> If a covered property loss makes the residence premises unfit to live in, we cover the necessary increase in living expense incurred by you so that your household can maintain its normal

> standard of living. We shall pay for the shortest time needed to (a) repair or replace the damaged property or (b) permanently relocate.

Harold Massey testified that he requested additional living expenses of $906 per month which were denied by Defendant. Defendant claims that this request was based on what Mr. Massey perceived as the fair market value of the house destroyed in the fire, and that Defendant had changed its policy so as to no longer reimburse for the fair market value of the destroyed property. However, whether the additional living expense provision included the fair market value of the damaged property during the period of its restoration was a disputed fact properly left to the resolution of the jury. Further, Defendant overlooks the additional testimony that after it cancelled Plaintiffs' insurance, Plaintiffs incurred $10,000 to $12,000 in additional expenses to make another building on Plaintiffs' property habitable. Taking all reasonable inferences from this testimony in Plaintiffs' favor, we cannot say that reasonable minds could not differ on the conclusion.

B.

Defendant next claims that the evidence was insufficient for the jury to find that Defendants breached the implied covenant of good faith and fair dealing. The parties agree that Oklahoma recognizes a cause of action sounding in tort for the bad faith breach of an insurance contract. *See Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1108-09 (Okla. 1991); *McCorkle v. Great Atl. Ins. Co.*, 637 P.2d 583, 588 (Okla. 1981). However, the parties dispute the quantum of evidence necessary to submit this issue to the jury.

1.

Defendant argues that unless Plaintiffs were entitled to a directed verdict on the breach of contract claim, the bad faith claim should not have been submitted to the jury. Defendant relies on *National Sav. Life Ins. Co. v. Dutton*, 419 So. 2d 1357 (Ala. 1982), in which the Alabama Supreme Court stated, "[o]rdinarily, if the evidence produced by either side creates a fact issue with regard to the validity of the claim and, thus, the legitimacy of the denial thereof, the tort claim must fail and should not be submitted to the jury." *Id.* at 1362.

In support of its contention that Oklahoma follows the rule announced in *Dutton*, Defendant directs us to *Christian v. American Assurance Co.*, 577 P.2d 899 (Okla. 1977), *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907 (Okla. 1982), and *Manis v. Hartford Fire Ins. Co.*, 681 P.2d 760 (Okla. 1984). In *Christian*, which was the first Oklahoma case to recognize a cause of action sounding in tort against an insurer for breaching an implied duty to deal fairly and act in good faith with its insured, the court affirmed a bad faith judgment based on an insurer's failure to pay a claim to which it had no defense. However, *Christian* does not suggest that an insurer's absence of a defense to a breach of contract claim is a necessary predicate to a bad faith cause of action. Indeed, in *Timmons*, also relied on by Defendant, the court affirmed a bad faith judgment based on the insurer's actions in investigating the claim, despite the fact that the insurer

had several defenses to the contract action.[1] The *Timmons* court recognized that "[t]he essence of the cause before the Court is failure to deal fairly and in good faith with an insured and as such, the jury may be shown the entire course of conduct between the parties to arrive at a determination of whether that standard had been breached or not." 653 P.2d at 917. While the Oklahoma Supreme Court reversed a bad faith judgment in *Manis* where the insurer refused to pay a claim for fire loss claiming that the insured intentionally set the fire, the bad faith claim was based solely on the insurer's refusal to pay and there was no other evidence that insurer failed to deal fairly with the insured. Thus, even though the jury rejected the insurer's arson defense on the contract claim, the *Manis* court found that there was no evidence that the insurer acted in bad faith in pursuing the defense.

In contrast to *Manis*, Plaintiffs' bad faith claim was based on Defendant's abuse of the statutory and contractual appraisal process.[2] The Oklahoma Supreme Court has made it clear that the question of bad faith turns on

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[1] Defendant contends that *Timmons* supports its position because prior to the bad faith action, the insured's liability to a third party had already been discharged by the insurer and thus the contract claim had already been resolved. 653 P.2d at 911.

[2] We note that, although Defendant's investigation indicated that the fire was intentionally set, Defendant never sought to deny coverage on the grounds that Plaintiffs were responsible for the fire, nor did Defendant assert such a defense at trial. Indeed, the district court granted Plaintiffs' motion in limine excluding all reference to any responsibility on the part of Plaintiffs for the fire.

the intent and reasonableness of the insurer's action, and the "crucial consideration" in determining whether to submit the issue to the jury is "the relative merit in the evidence supporting [the insurer's] defense." *Conti v. Republic Underwriters Ins. Co.*, 782 P.2d 1357, 1361 (Okla. 1989). In *McCorkle v. Great Atl. Ins. Co.*, 637 P.2d 583 (Okla. 1981), the Oklahoma Supreme Court rejected the argument that allowing a bad faith cause of action denies insurers their right to have a judicial determination on the amount due on a fire insurance policy, noting that "a party prosecuting a claim of bad faith must plead the elements of the tort and he/she has the burden of proof. The pleading and proof requirements are the same as in other lawsuits." *Id.* at 587. Clearly rejecting the argument raised by Defendant here, the *McCorkle* court stated that

> the essence of the intentional tort of bad faith with regard to the insurance industry is the insurer's unreasonable, bad-faith conduct . . . and if there is conflicting evidence from which different inferences may be drawn regarding the reasonableness of insurer's conduct, then what is reasonable is aiways a question to be determined by the trier of fact by a consideration of the circumstances in each case.

Id. More recently, the Oklahoma Supreme Court recognized that whether or not an insured is legally entitled to recover under the policy is not the "controlling issue" in a bad faith action based on a denial of coverage; rather, the bad faith issue, in such a case, turns on "whether [the insurer], at the time [the insureds] made their claim, was in possession of information to establish that its refusal to pay was in good faith. . . . " *Buzzard v. McDanel*, 736 P.2d 157, 159 n.3 (Okla. 1987). Similarly, in *McCoy v. Oklahoma*

Farm Bureau Mut. Ins. Co., 841 P.2d 568 (Okla. 1992), the court held that the issue of bad faith was properly submitted to the jury despite the existence of a triable issue as to whether the insured had burned down his own house. *Id.* at 570-72. Thus, we reject Defendant's argument that Plaintiffs must have been entitled to a directed verdict on the breach of contract claim in order to submit the bad faith claim to the jury.

2.

We turn to the question of whether a reasonable jury could have found that Defendant breached the implied covenant of good faith and fair dealing. Plaintiffs' cause of action was based on Defendant's handling of their claim, specifically Defendant's abuse of the statutory and contractual appraisal process. The Oklahoma Supreme Court has recognized that the manner in which an insurer handles a claim may be the basis for a bad faith judgment, *see Buzzard v. Farmers Ins. Co.*, 824 P.2d 1105, 1109 (Okla. 1991); *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 917-18 (Okla. 1982), as well as actions by an insurer which unreasonably withhold the payment of claims. *Christian v. American Assurance Co.*, 577 P.2d 899, 904-05 (Okla. 1977).

Taken in the light most favorable to Plaintiffs, the evidence at trial amply supported Plaintiffs' claim that Defendant acted in bad faith by manipulating and abusing the statutory and contractual appraisal process. First, according to Defendant's own training manual, it was against company policy to invoke the appraisal process

or to even call it to the attention of the insured.[3] Nevertheless, Defendant did invoke the appraisal process following the fire which destroyed Plaintiffs' home. Second, under the appraisal process, each party is required to appoint a "competent and disinterested appraiser" once either party has made a written demand for an appraisal. Okla. Stat. Ann. tit. 36 § 4803 (West 1990). Substantial evidence was presented that the first appraiser appointed by Defendant was not competent, and that neither of the two appraisers appointed by Defendant were disinterested. Defendant's first appraiser, Wilburn, was an attorney who did substantial work on Defendant's behalf, and indeed had been retained by Defendant to represent it in its dealings with Plaintiffs. The second appraiser, Murlowski, relied on insurance work, a substantial portion of which was from Defendant, for his livelihood, and he had earlier provided an estimate for repairing the house. Moreover, there was direct evidence, in the form of a letter by one of Defendant's attorney [sic] who happened to be an associate of Wilburn, that Defendant attempted to improperly influence the second appraiser by conveying its expectation that the appraiser would stand by his estimate to rebuild the house. Thus, Defendant's overt failure to follow the terms of its own policy regarding the appraisal process provides substantial evidence that Defendant acted unreasonably and in bad faith.

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[3] Although Defendant presented testimony that the training manual did not reflect current company policy, whether Defendant complied with its own internal policy was a disputed issue for the jury's resolution.

Other evidence submitted by Plaintiffs could reasonably lead the jury to infer that Defendant attempted to pressure Plaintiffs into accepting the lesser amount to repair the house, as opposed to having it rebuilt. Defendant took an average of thirty-seven days to submit a loss for authority to settle; however, in this case, Defendant took eighty-five days to submit the contents portion of Plaintiffs' claim. A reasonable inference is that Defendant delayed payment on the contents in order to pressure Plaintiffs to settle on the structure, thereby supporting Plaintiffs' assertion that Defendant acted unreasonably and in bad faith in handling Plaintiffs' claim. Furthermore, Defendant cancelled Plaintiffs' insurance policies even though Defendant's own investigation indicated that Plaintiffs were not at fault for the fire. Again, it was reasonable for the jury to infer that this cancellation was an attempt to pressure Plaintiffs into settling the loss on the structure.

Finally, in addition to the evidence concerning Defendant's abuse of the appraisal process and the evidence supporting the inference that Defendant attempted to pressure Plaintiffs into accepting its offer, there was substantial evidence that Defendant's actions unreasonably withheld the payment of Plaintiffs' claim. There was testimony that the branch office's authority to settle a claim on a structure was limited to $40,000, and any claim in excess had to be submitted to the regional office for approval. Defendant's own estimate exceeded $40,000, yet defendant waited until June 5, 1986, almost a year after the fire, to request settlement authority from the regional officer. When authority was finally granted to

settle Plaintiffs' claim for the policy limits of $75,000, Defendant never offered this amount to Plaintiffs.

In light of this evidence, and the reasonable inferences that may be drawn from it, the evidence was more than sufficient to submit the issue of whether Defendant breached the implied covenant of good faith and fair dealing to the jury.

C.

Defendant also contends that, even if there was sufficient evidence of bad faith, the evidence was insufficient to show that Defendant acted fraudulently, maliciously or oppressively, and, therefore, the punitive judgment award cannot stand. Under Oklahoma law, malice may be inferred when a party commits willful acts in reckless disregard of another's rights. *Slocum v. Phillips Petroleum Co.*, 678 P.2d 716, 719 (Okla. 1983). Our review of the evidence, and specifically Defendant's failure to follow the terms of its own policy regarding the appraisal process, convinces us that an inference of malice could properly be drawn by the jury.

Defendant raises a related argument, which although purporting to challenge the sufficiency of the jury instruction on punitive damages, appears to be based on the district court's finding, pursuant to Okla. Stat. Ann. tit. 23, § 9 (West 1987), that there was clear and convincing evidence to support the award of punitive damages. Oklahoma law requires the district court, at the conclusion of all the evidence, to make a finding outside of the presence of the jury "that there is clear and convincing evidence that the defendant is guilty of conduct evincing

a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed" in order for the jury to award punitive damages. *Id.* When the district court makes such a finding, the limitation on punitive damages to the amount of actual damages, *see id.* (historical note) (discussing 1986 amendment), does not apply. *Id.*

The district court found that there was "certainly clear and convincing evidence that the defendant is guilty of conduct evincing the wanton and reckless disregard for the rights of others." VIII R. trans. at 1422. For the reasons heretofore stated, we believe that the district court's finding is supported by the record. Because willful acts in reckless disregard of Plaintiffs' rights may lead to an inference of malice, *Slocum v. Phillips Petroleum Co.*, 678 P.2d 716, 719 (Okla. 1983), the district court properly submitted this issue to the jury without limiting the punitive damages to the amount of actual damages.

IV.

Defendant raises a myriad of claims alleging error in the admission of evidence. We review the district court's ruling on the admissibility of the evidence for an abuse of discretion. *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1155 (10th Cir. 1985); *Rasmussen Drilling, Inc. v. Kerr-McGee Nuclear Corp.*, 571 F.2d 1144, 1149 (10th Cir.), *cert. denied*, 439 U.S. 862 (1978). Even if the district court abuses its discretion by erroneously admitting particular evidence, we will not reverse a judgment when the error is harmless – *i.e.* when the error does not affect a substantial right of the party asserting error. *K-B Trucking*, 763

F.2d at 1156. *See also* Fed. R. Civ. P. 61; Fed. R. Evid. 103(a). "[T]he burden of demonstrating that substantial rights were affected rests with the party asserting error." *K-B Trucking*, 763 F.2d at 1156.

A.

Defendant claims that the district court erred in admitting evidence concerning the worth of companies that do business under the name Farmers Insurance Group. According to Defendant, evidence of its worth, which was relevant to the issue of the amount of punitive damages, should have been limited to evidence of the worth of Truck Insurance Exchange/Truck Underwriters Association which is the named party on the insurance policy. Although Defendant has not specified the Federal Rule of Evidence which purportedly renders this evidence inadmissible, Defendant's argument appears to be based on relevancy. *See* Fed R. Evid. 402.

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Under Oklahoma law, punitive damages are awarded to punish wrongdoers for wrongs committed upon society and to deter them from such conduct in the future. Okla. Stat. Ann. tit. 23, § 9 (1987). Accordingly, evidence of the worth of a party against whom punitive damages are being sought is relevant to the issue of the amount of damages necessary to

sufficiently punish and deter the party.[4] *See Silkwood v. Kerr-McGee Corp.*, 769 F.2d 1451, 1460 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986); *Spaeth v. Union Oil Co.*, 762 F.2d 865, 866 (10th Cir. 1985), *cert. denied*, 476 U.S. 1104 (1986).

Nonetheless, Defendant argues that Farmers Insurance Group was not a party to the contract and therefore could not be liable for bad faith breach of the contract. *See Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 912-13 (Okla. 1982). Thus, Defendant argues that evidence of the worth of Farmers Insurance Group should not have been admitted. This is a curious proposition considering that Farmers Insurance Group is the named defendant in the lawsuit. Under Defendant's reasoning, evidence of its worth should have been limited to the worth of Truck Insurance Exchange/Truck Underwriter Association, a subordinate entity within the rubric of companies forming Farmers Insurance Group. In light of the evidence in the record showing a significant financial relationship between Farmers Insurance Group and Truck Insurance Exchange/Truck Underwriters Association, Farmers Insurance Group's control over the subordinate entity in the handling of claims in general, and the handling of the

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[4] Defendant claims that the evidence was prejudicial because Farmers Insurance Group had assets of $10.1 billion in 1986 while Truck Insurance Exchange/Truck Underwriters Association had assets of between $700-800 million and a net worth of $356 million, thereby making the jury more inclined to award a greater amount of punitive damages. Nonetheless, we do not reach the question of prejudice in light of our holding, based on the record before us, that Farmers Insurance Group is the relevant entity.

claim in this case in particular, we believe that the worth of Farmers Insurance Group is the relevant inquiry in determining the amount of damages sufficient to punish and deter Defendant from its tortious conduct.

B.

Defendant next claims that the admission of evidence concerning its granting of settlement authority in the amount of $75,000 to its branch office in June 1986 violated Fed. R. Evid. 408. This rule provides that

> [e]vidence of (1) furnishing or offering or promising to furnish . . . a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for . . . the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.

Fed. R. Evid. 408. Defendant's argument fails for at least two reasons. First, the evidence was undisputed that Defendant never furnished, offered or promised to furnish $75,000 to settle Plaintiffs' claim, nor was this evidence of conduct in compromise negotiations. Thus, the evidence was not the type for which a Rule 408 objection will lie. Second, the evidence was not offered to prove liability. Rather, Plaintiffs offered this evidence to show that, by June 1986, Defendant had evaluated the loss at the policy limits but *failed* to offer this amount to Plaintiffs. Therefore, because the evidence was relevant to the issue of whether Defendant unjustifiably withheld payment of the claim thereby breaching the implied covenant

of good faith and fair dealing, we find no abuse of discretion in its admission.

C.

Defendant next contends that the district court erred in admitting evidence that Defendant cancelled Plaintiffs' three other policies following the fire. Defendant's sole argument on appeal is that such evidence was not admissible because the cancellation of the policies did not violate Okla. Stat. Ann. tit. 36, § 4807 (West 1990), which limits the reasons insurers may cancel policies. Whether or not the cancellation of the policies violated state law, this evidence was properly admitted to show the course of dealing between Defendant and Plaintiffs and tended to support Plaintiffs' argument that Defendant cancelled the policies to pressure Plaintiffs into settling the loss on their dwelling. Accordingly, we find no abuse of discretion in admitting this evidence.

D.

Defendant argues that the district court erred in admitting the depositions of Charles Medlock, an employee of defendant, and Peter Murlowski, an independent contractor whom Defendant hired as its second appraiser. Again, Defendant's brief does not specifically articulate why the deposition testimony was inadmissible. However, Defendant asserts that the videotaped depositions should not have been admitted because both persons were available to testify and because Murlowski was not an agent of Defendant. Further, Defendant argues that the district court's informing the jury that the

deposition testimony were admissions against interest was prejudicial to Defendant. While we do not necessarily agree with the specifics of Defendant's argument, we agree that district court abused its discretion in admitting the videotaped depositions.

The use of depositions in a court proceeding is governed by Rule 32 of the Federal Rules of Civil Procedure. The deposition must be admissible under the rules of evidence[5] and may only be admitted against a party who was present or represented at the deposition. Fed. R. Civ. P. 32(a). Moreover, Rule 32 further limits the admissibility of depositions in court proceedings. A "deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness, or for any other purpose permitted by the Federal Rules of Evidence." Fed. R. Civ. P. 32(a)(1).[6] Neither Medlock nor

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[5] Although the district court stated that the deposition was an "admission against interest," it appears that what it meant was that the deposition was an admission by an agent of a party opponent. This distinction is important because an admission by the agent of a party opponent is considered non-hearsay and does not require unavailability of the declarant, Fed. R. Evid. 801(d)(2), while a statement against interest is considered an exception to the hearsay rule and does require the unavailability of the declarant. *Id.* 804(b)(3). While we recognize Defendant's argument that Murlowski was not its agent, and, therefore, his deposition was not admissible under Fed. R. Evid. 801(d)(2)(D), we need not resolve this issue because neither deposition was admissible under Fed. R. Civ. P. 32.

[6] While the rule does allow the deposition to be used "for any other purpose permitted by the Federal Rules of Evidence," this provision was added by the 1980 amendment to allow the use of depositions to bring in prior inconsistent statements admissible under Fed. R. Evid. 801(d)(1). 4A James W. Moore,

Murlowski testified prior to the introduction of their deposition; therefore, their depositions were not admissible as impeachment. Rule 32 also permits "the deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a public or private corporation, partnership or association or governmental agency which is a party" to be used in a court proceeding by an adverse party. Fed. R. Civ. P. 32(a)(2). While Plaintiffs claim that Medlock and Murlowski were agents of Defendant, there is no contention that they were "officers, directors, managing agents, or persons designated pursuant to Rule 30(b)(6) or 31(a)" to testify on behalf of Defendant. Finally, Rule 32 permits the use of depositions in court proceedings when the witness is unavailable to testify for particular reasons or when the court finds "exceptional circumstances." Fed. R. Civ. P. 32(a)(3). Here, both witnesses were available to testify, and there is no claim that exceptional circumstances existed. Accordingly, the depositions of Medlock and Murlowski were not properly admitted into evidence.

Having found error in the admission of the depositions, we turn to the question of whether it affected a

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Moore's Federal Practice, ¶ 32.03, at 32.17 (2d ed. 1992). The fact that the deposition may be admissible under Fed. R. Evid. 801(d)(4)(D) as an admission by an agent of a party opponent, does not make it admissible "for any other purpose" under Fed. R. Civ. P. 32(a)(1). *See* 4A Moore, *supra*, ¶ 32.04, at 32-25. *See also* Fed. R. Civ. P. 32 (Advisory Committee Note to 1980 Amendment) (noting that language of subdivision (a)(1) is "too narrow" so as to be consistent with Fed. R. Evid. 801(d)(2)).

substantial right of Defendant. We note that since both witness [sic] were available, Defendant had the opportunity to call them to the stand to rehabilitate their testimony, and, in fact, did so with respect to Murlowski. Further, Medlock's deposition was videotaped and the tape was presented to the jury, thereby permitting the jury to view the demeanor of the witness. Finally, Defendant offers no argument as to how it was prejudiced by the admission of the depositions, and given that the testimony appears to be largely undisputed,[7] we fail to see how a substantial right of Defendant has been affected. Thus, we hold that the district court's error in admitting the depositions of Medlock and Murlowski was harmless.

V.

Defendant next claims error in the instructions to the jury. In reviewing jury instructions, we must "consider all that the jury heard and . . . decide not whether the charge

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[7] Medlock testified about Defendant's procedures in handling claims, the chain of command within Defendant's company, the authority to settle claims within the various levels of Defendant's company, Defendant's relationship with Wilburn, Medlock's specific request to Wilburn in June 1986 to settle Plaintiffs' claim for the policy limits, and the cancellation of Plaintiffs' other policies. Defendant has not disputed any of this testimony.

Murlowski testified about the nature of his insurance repair business and his relationship with insurance companies in general and Defendant in particular. Murlowski also testified about his work on Defendant's behalf in estimating and appraising Plaintiffs' loss. Again, Defendant has not disputed any of this testimony.

was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine these issues." *Durflinger v. Artiles*, 727 F.2d 888, 895 (10th Cir. 1989). *See also Ramsey v. Culpepper*, 738 F.2d 1092, 1098 (10th Cir. 1984). "[A]n error in the jury instructions will mandate reversal only if the error is determined to have been prejudicial, based on a review of the record as a whole." *Durflinger*, 727 F.2d at 895 (internal quotations omitted).

A.

Defendant first contends that the district court erred in failing to instruct the jury that attorneys fees and interest should not be included in the award of damages. Given that no evidence was presented concerning attorneys fees and interest, we fail to see the necessity of such an instruction and find no abuse of discretion in failing to give it.

B.

Defendant next contends that the district court erred in failing to give Defendant's proffered instruction concerning the contract measure of damages under the dwelling coverage provision of the policy. On the issue of damages for the breach of contract claim, the district court instructed the jury as follows:

> If you find that the defendant is liable to plaintiffs on their breach of contract cause of action you must then fix the amount of money which will reasonably and fairly compensate plaintiffs for any of the following elements of damage

proved by the evidence to have resulted from the defendant's breach of contract:

1. Fire and casualty loss to plaintiff's [sic] residence;

2. Additional living expenses.

Although Defendant has not directed this court to where in the record we can find its specific proffered instruction on the issue, defense counsel characterized the instruction to the district court as limiting Defendant's liability under the dwelling coverage "as being the smallest of the . . . policy limit . . . replacement . . . [or] the amount actually and necessarily expended to repair the house." IX R. trans. at 1428-29. Although the district court's instruction may not have been a model of completeness, in light of the alternative presented by Defendant, we cannot say that the district court abused its discretion.

C.

Finally, Defendant claims that it was error to instruct the jury on the statutory duty of insurance companies under the Oklahoma Fair Claims Resolution Act, because the act was not effective until June 1986 or November 1986 while the loss occurred in June 1985 and because the act does not apply to private causes of action. Although Defendant has not directed us to where in the record we can find this allegedly erroneous instruction, Defendant's objection appears to relate to the district court's instruction regarding "acts constitut[ing] unfair claim settlement practices," *see* Okla. Stat. Ann. tit. 36, § 1222 (West Supp. 1993); IX R. trans. at 1501-02, and its instruction regarding prohibited acts by an insurer and its agent. Okla. Stat.

Ann. tit. 36, § 1254 (West Supp. 1993); IX R. trans. at 1502-03. Section 1222 was not effective until June 1986, and Section 1254 was not effective until November 1986.[8]

In regards to Defendant's claim that the statutes do not apply to private causes of action, our review of the record indicates that Defendant did not object to the instruction on this ground. Rule 51 of the Federal Rules of Civil Procedure provides that "[n]o party may assign as error the giving . . . an instruction unless that party objects thereto before the jury retires to consider its verdict, *stating distinctly the matter objected to and the grounds of the objection.*" Fed. R. Civ. P. 51 (emphasis added). Because Defendant's objection was limited solely to the ground that the statutes were not effective until June or November 1986, Defendant has waived the issue of whether the statutes are applicable to private causes of action.

As to Defendant's claim that the instructions were erroneous because the statutes were not effective until June or November 1986, Defendant's actions induced the trial court into giving the instruction; therefore, Defendant is precluded from raising this issue on appeal by the "invited error" doctrine. "When a party wishing to raise a

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[8] The district court also instructed the jury on Oklahoma's statutory limitation on the grounds for which an insurer can cancel coverage. *See* Okla. Stat. Ann. tit. 36, § 3639(C) (West 1990). *See also* IX R. trans. at 1500-01. However, Defendant's argument, which is limited to the statutes that were effective in June or November 1986, does not appear to challenge this instruction, because the statute on which it was based was effective in July 1985. *See* Okla. Stat. Ann. tit. 36, § 3639 (Historical and Statutory Notes).

new issue on appeal has by its words or actions invited the alleged error below, it is particularly inappropriate to consider that theory of relief on appeal." *Hokansen v. United States*, 868 F.2d 372, 378 (10th Cir. 1989) (citation omitted). *See also Gundy v. United States*, 728 F.2d 484, 488 (10th Cir. 1984) ("[A]n appellant may not complain on appeal of errors which he himself induced or invited."). After Defendant objected to these instructions on the ground that the statutes were not effective until after the date of Plaintiffs' loss, Plaintiffs offered to amend the instruction to specifically inform the jury that Defendant's statutory duties applied only to its acts taken after the effective date of the statute. Defendant declined Plaintiffs' amendment claiming that it "would then place the burden on an insurance adjuster to anticipate what the law might be a year later." IX R. trans. at 1433. According to defense counsel, the instruction as offered to be amended by Plaintiffs would "have a prejudicial effect;" *id.*, however, defense counsel failed to specify, either in the district court or on appeal, how the instruction as amended would have been prejudicial. The district court indicated that it was inclined to amend the instruction to make clear that Defendant's statutory duty only applied to acts taken after the effective date of the statute, but declined to amend the instruction based on Defendant's objection to the amendment. While we agree that any statutory duty of Defendant would only arise after the effective date of the statute, it is undisputed that Defendant continued to handle Plaintiffs' claim after the effective dates of the statutes. Given that the statutes were in effect at the time of at least some of Defendant's acts which gave rise to Plaintiffs' bad faith claim, we do

not see how Plaintiffs' amendment would have prejudiced Defendant, and, as noted earlier, Defendant neglects to inform us as to the nature of the prejudice. Indeed, it appears that Plaintiffs' amendment would have cured the very objection raised by Defendant on appeal. Under these circumstances, Defendant's objection to Plaintiffs' amendment invited the very error of which Defendant now complains; therefore, this issue cannot be raised on appeal.

VI.

Defendant argues that the $4,000,000 punitive damage award violates the Eighth Amendment's proscription against excessive fines. The "Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties." *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989). Thus, Defendant's argument is without merit.[9]

VII.

Defendant argues that the district court improperly calculated the attorneys fees award. Under Oklahoma law, attorneys fees are awarded to the prevailing party in an action between an insurer and an insured. Okla. Stat. Ann. tit. 36, § 3629(B) (West 1990). The district court

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[9] While the Supreme Court has recognized that the due process clause may provide some limits on awarding punitive damages, *see Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1043-46 (1991), Defendant's argument is limited to an Eighth Amendment challenge.

calculated the attorneys fees based on the time spent prosecuting both the breach of contract claim and the bad faith claim. Defendant concedes that attorneys fees are recoverable on the breach of contract claim but argues that such fees are not recoverable on the bad faith claim. Defendant argues that the district court should have apportioned the time of Plaintiffs' attorneys between the two claims. We have squarely rejected this argument. *See Thompson v. Shelter Mutual Ins.*, 875 F.2d 1460, 1464 (10th Cir. 1989). *See also Oliver's Sports Center v. National Standard Ins. Co.*, 615 P.2d 291, 295 (Okla. 1980) (recognizing recovery of attorneys fees under § 3629(B) for time spent prosecuting bad faith claim).

VIII.

In their cross-appeal, Plaintiffs raise three arguments. First, Plaintiffs contend that the district court erred in limiting the prejudgment interest solely to the compensatory damages. Second, Plaintiffs contend that the district court erred in determining "the date the loss was payable" for purposes of calculating the award of prejudgment interest. Finally, Plaintiffs contend that the district court erred in calculating the award of attorneys fees. We find no merit in any of Plaintiffs' arguments.

A.

Plaintiffs first argue that punitive damages should be included in the calculation of the prejudgment interest award. Oklahoma law provides for the award of prejudgment interest "on the verdict at the rate of fifteen percent

(15%) per year from the date the loss was payable pursuant to the provisions of the contract to the date of the verdict." Okla. Stat. Ann. tit. 36, § 3629 (West 1990). Plaintiffs rely on *Oliver's Sports Center v. National Standard Ins. Co.*, 615 P.2d 291 (Okla. 1980), wherein the Oklahoma Supreme Court recognized that an attorney's time in prosecuting a bad faith claim could be included in the attorneys fees calculation under § 3629. *Id.* at 295.

In *Casto v. Arkansas-Louisiana Gas Co.*, 562 F.2d 622 (10th Cir. 1977), we held that prejudgment interest was not recoverable on a punitive damage award under Okla. Stat. Ann. tit. 12, § 727(2), a similar Oklahoma statute governing prejudgment interest on damages by reason of personal injury. *Id.* at 625-26. We reasoned that express terms of the statute limited prejudgment interest to a "verdict for damages by reason of personal injuries." *Id.* at 625. Moreover, we noted that punitive damages are in the nature of punishment, rather than compensation. *Id. See also* Okla. Stat. Ann. tit. 23, § 9.

While the language of §3629, unlike the statute at issue in *Casto*, does not expressly preclude prejudgment interest on punitive damages, we do not believe that the Oklahoma Supreme Court would interpret § 3629 to provide for prejudgment interest on a punitive damage award. As we noted in *Casto*, punitive damages are designed to punish the defendant rather than compensate the plaintiff. 562 F.2d at 625. *See also* Okla. Stat. Ann. tit. 23, § 9 (West 1987). Awarding prejudgment interest on compensatory damages fulfills the underlying purpose of making Plaintiffs whole. By contrast, allowing prejudgment interest on punitive damages would only serve to further punish Defendant when the jury has already

determined the amount necessary to sufficiently punish Defendant. Finally, the prejudgment interest statute calculates the interest from "the date the loss was payable." Okla. Stat. Ann. tit. 36 § 3629. The bad faith conduct which gave rise to the punitive damage award in this case occurred over a substantial period of time. Not only does a punitive damage award not involve payment for a "loss," Defendant had no obligation to pay an award until the jury's verdict. Thus, we do not believe the statute supports Plaintiffs' construction.

B.

Plaintiffs also argue that the district court's determination of the date that the prejudgment interest should begin to accrue was erroneous. Under Oklahoma law, an insurer has a duty to submit a written offer of settlement or rejection of a claim within ninety days after receipt of a proof of loss. Okla. Stat. Ann. tit. 36, § 3629 (West 1990). The district court determined that the loss was payable on December 29, 1985, ninety days after Plaintiffs submitted their proof of loss to Defendant. Nonetheless, Plaintiffs argue that Defendant waived the proof of loss, and therefore they should have been awarded prejudgment interest from the date of the loss. Whether or not Defendant waived the proof of loss is a factual determination to which we give the district court's finding deference. Moreover, Plaintiffs' argument unreasonably assumes that their loss was payable on the date of the fire. Thus, we find no error in the district court's determination of the date the loss was payable.

C.

Finally, Plaintiffs argue that the district court erred in determining the amount of attorneys fees. As earlier noted, Oklahoma law allows the prevailing party in an action between an insurer and an insured to recover costs and attorneys fees. Okla. Stat. Ann. tit. 36, § 3629 (West 1990). The district court determined the amount of attorneys fees by multiplying the hours spent by Plaintiffs' attorneys by a reasonable hourly rate and then doubling this amount to account, presumably for the contingency, which is appropriate under Oklahoma law. *See Oliver's Sports Center v. National Standard Ins. Co.*, 615 P.2d 291, 294 (Okla. 1980). Notwithstanding Plaintiffs' contention that the fee should have been 40% of the total recovery in accordance with the contract between Plaintiffs and their attorney, we cannot say the district court abused its discretion in calculating the fees as it did.

AFFIRMED.

Entered for the Court

Bobby R. Baldock
Circuit Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

HAROLD MASSEY and DOROTHY MASSEY, Plaintiffs, -vs- FARMERS INSURANCE GROUP, d/b/a TRUCK INSURANCE EXCHANGE, TRUCK UNDERWRITERS ASSOCIATION, Defendants.	No. 87-324-C Muskogee, Oklahoma April 7, 1988 VOLUME I

TRANSCRIPT OF PROCEEDINGS

PAGES 3 - 318

BEFORE THE HONORABLE FRANK H. SEAY, Chief Judge, and jury.

APPEARANCES:

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Proceedings recorded by mechanical stenography, transcript produced by Computer Assisted Transcription.

* * *

[p. 282] in Tulsa have produced. I would refer you to a copy of page twenty from training text number 13, dealing with fire losses. And I ask you, sir, if you're familiar with that page?

A. I'm familiar with the language, yes.

Q. And how did you become familiar with the language?

A. Through the basic property course, plus the various outside educational courses that I have pursued, and the working knowledge of that section in the contract.

Q. And this would be material utilized during your training?

A. That's correct.

Q. And would it be material utilized by you, or available by you in the offices you've been with for the training of the adjusters?

A. Yes.

Q. Sir, let me have you, if you would, please, read to the Court and jury the language below the appraisal provision of the policy so that the jury might become familiar with Farmers instruction in that regard.

A. "While this provision provides an apparently reasonable quick and inexpensive way to resolve disputes, the company does not invoke it under any circumstances. Claims personnel are expressly warned not to call it to the attention of policyholders and attorneys, not to discuss it [p. 283] when mentioned."

Q. Do you know why that information, sir, would be in the training materials available for the use of Farmers adjusters?

A. No.

Q. My question for you, then, sir, would be the language contained under the appraisal provision of the policy as reflected in training text 13, page twenty, does that to you seem to be a fair way to treat the policyholders?

A. I'm uncomfortable with it.

Q. All right. Sir, let me have that back, if I could, for a moment, and I would like to direct your attention to another one of the training documents that your lawyers have furnished in discovery, so that you know where

these came from. And this would be page 140 of training text number 20.

Would you read to the jury, please, the language starting in the paragraph, "The following policyholders," all the way down to the bottom. And there's a natural tendency when you read to read quickly, so quickly that the court reporter can't even take it down. So if you would make an effort to read it slowly so the ladies and gentlemen of the jury, as well as the court reporter, can catch every word I would appreciate it.

A. "The following policyholders must generally be singled

* * *

[Cover Illustration Omitted]

The provision does not give us a license to harass. The language says, ". . . . as often as may be reasonably required . . . "

> 117 **Appraisal.** In case the insured and this company shall fail to 118 agree as to the actual cash value or the amount of loss, then, on 119 the written demand of either, each shall select a competent and 120 disinterested appraiser and notify the other of the appraiser 121 selected within 20 days of such demand. The appraisers 122 shall first select a competent and disinterested umpire; and fail- 123 ing for 15 days to agree upon such umpire, then, on request of 124 the insured or this company, such umpire shall be selected by a 125 judge of a court of record in the state in which the property cov- 126 ered is located. The appraisers shall then appraise the loss, 127 stating separately actual cash value and loss to each item; and, 128 failing to agree, shall submit their differences, only, to the um- 129 pire, An award in writing, so itemized, of any two when filed 130 with this company shall determine the amount of actual cash 131 value and loss. Each appraiser shall be paid by the party 132 selecting him and the expenses of appraisal and umpire shall 133 be paid by the parties equally.

While this provision provides an apparently reasonable, quick and inexpensive way to resolve disputes, the company does not invoke it under any circumstances. Claims personnel are expressly warned not to call it to the attention of policyholders and attorneys; not to discuss it when mentioned.

It would seem that the appointment of a representative expert for each party, and an impartial umpire to resolve their disputes, should produce a mutually acceptable result. It does not. The result is monotonously adverse to the insurer. We avoid appraisals whenever possible.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

HAROLD MASSEY and DOROTHY MASSEY, Plaintiffs, -vs- FARMERS INSURANCE GROUP, d/b/a TRUCK INSURANCE EXCHANGE, TRUCK UNDERWRITERS ASSOCIATION, Defendants.	No. 87-324-C Muskogee, Oklahoma April 13, 1988 VOLUME V

TRANSCRIPT OF PROCEEDINGS
PAGES 1181 - 1423

BEFORE THE HONORABLE FRANK H. SEAY, Chief Judge, and jury.

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* * *

[p. 1248] and demurs to the evidence.

THE COURT: There's no such thing as a demur in Federal Court.

MR. WILLIAMS: Comes now the defendant and requests a directed verdict on the part of the defendant on the grounds of no cause of action has been proven against this defendant. And I would like to break this down into the three categories, Your Honor. That has to do with the dwelling coverage, which there is a dispute about.

It's my understanding at time that there is not any dispute concerning the contents coverage. And for the additional living expense coverage, the defendant takes the position there has not been any actual proof of additional living expense. There had been no evidence entered in this case to show any specific amount of additional living expense.

Further the defendant is requesting a directed verdict on punitive damages. And, further, that in the event that the Judge allows punitive damage to go to the jury that the judge place a cap on the punitive damages as provided by 23 Oklahoma Statute Section 9.

And further the defendant would like to, on the record, object to any punitive damages being given to the

jury on the basis of the violation of the defendant's 4th, 5th, 6th, 8th and 14th Amendments, the rights thereunder.

* * *

[p. 1421] immaterial to me.

MR. HASKINS: Very well, we'll use that, Your Honor.

THE COURT: Anything that would be helpful.

Yes sir.

MR. WILLIAMS: I just want to make a record.

THE COURT: Then you may.

MR. WILLIAMS: Comes now the defendant and renews its request for a directed verdict on the grounds that no cause of action has been proven against the defendant Truck Insurance Exchange concerning the additional living expense. There has been no expenses and no receipts given in that regard.

And we also request a verdict in favor of this defendant concerning punitive damages, because this is a damage dispute, and as stated in Christian, there's always – a damage dispute is not something that gives rise to a bad faith cause of action.

Further, we would request that if the Court is going to give the jury instructions concerning punitive damages, that then it would be more – we want the Court to instruct the jury under Statute 23 – Title 23 Section 9, concerning the cap on punitive damages, that this would be a proper case for the cap to be placed on punitive damages. And also we would object to the allowance of

punitive damages against [p. 1422] this defendant because it would be in violation of the 4th, 5th, 6th, 8th, and 14th Amendments to the United States Constitution.

And further we would ask that the verdict be directed for the non-entity Farmers Insurance Group.

THE COURT: The motion for a directed verdict will be overruled for the reason earlier given.

Do you have something, Mr. Atkinson?

MR. ATKINSON: No. No.

THE COURT: Well, no one has urged the Court to, but it wasn't mentioned earlier. And I will make the finding concerning Title 23 Oklahoma Statute, Section 9. I find that there is certainly clear and convincing evidence that the defendant is guilty of conduct evincing the wanton and reckless disregard for the rights of others.

And, consequently, I'm going to submit to the jury punitive damages, and leave it open-ended.

Yes?

MR. ATKINSON: Your Honor, in that regard, we do this out of the an abundance of caution. Plaintiffs would move this Honorable Court to enter an order directing a verdict in their favor on all counts, including the structural damages, the actual damages, and punitive damages.

THE COURT: Denied for the reason earlier given

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

HAROLD MASSEY and DOROTHY MASSEY, Plaintiffs, -vs- FARMERS INSURANCE GROUP, d/b/a TRUCK INSURANCE EXCHANGE, TRUCK UNDERWRITERS ASSOCIATION, Defendants.	No. 87-324-C Muskogee, Oklahoma April 14, 1988 VOLUME VI

TRANSCRIPT OF PROCEEDINGS
PAGES 1424 - END

BEFORE THE HONORABLE FRANK H. SEAY, Chief Judge, and jury.

APPEARANCES:

FOR THE PLAINTIFFS:
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Proceedings recorded by mechanical stenography, transcript produced by Computer Assisted Transcription.

* * *

[p. 1430] should be submitted to the jury.

The defendant objects to the instruction which states – the heading of this instruction is Duty of Insurance Company. And it's the defendant's understanding that the instruction comes out of the Christian case. But the difference being the Christian case involved a health insurance policy, which does require immediate payment. And under a property insurance policy, the defendant has sixty days to respond to the proof of loss.

The third instruction that the defendant objects to is the measure of actual damages on plaintiff's cause of action for breach. And, again, that has to do with the punitive damages.

The fourth instruction that we object to is the punitive or exemplary damage instruction. And the reason that we're doing that is because we're taking the position that it should not be submitted to the jury.

The fifth instruction is the verdict on the plaintiff's cause of action for the breach of implied covenant, and that would be the – I don't know whether that's an instruction or a verdict form, Your Honor, but we would want to take exception to both those.

The next instruction is the Oklahoma law on insurance, and the reason that we object to the instructions

given. The Oklahoma law on insurance contains two statutes. The

* * *

[p. 1500] to recover actual damages against the defendant on their cause of action or breach of implied covenant of good faith and fair dealing and you further find that the evidence that the conduct – and you further find from the evidence that the conduct of the defendant amounted to oppression, gross negligence, or willful and wanton conduct which was in reckless disregard of plaintiffs rights, then in addition to actual damages to which you find plaintiffs entitled, you may award plaintiffs an additional amount as exemplary or punitive damages, in such sum as you believe will serve to punish the defendant and for the sake of example to deter other from like conduct.

The statutes or laws of the State of Oklahoma provide, once an insurance policy has been in effect for more than sixty days a notice of cancellation shall not be issued by the insurer except for the following reasons:

1. None payment of premium;

2. Discovery of fraud or material misrepresentation in the procurement of the insurance or with respect to any claim submitted thereunder;

3. Discovery of willful or reckless acts or omission on the part of the named insured which increase any hazard insured against;

4. The occurence [sic] of a change in the risk which substantially increases any hazard insured against after

* * *

§ 9. Jury may give exemplary damages, when

A. In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of actual damages awarded. Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing the defendant, and the percentage limitation on such damages set forth in this section shall not apply.

B. The provisions of this section shall be strictly construed.

RELEASE FOR PUBLICATION BY ORDER OF THE COURT OF APPEALS IN THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

DIVISION NO. III

RONDA SCRIBNER, Appellee, vs. HILLCREST MEDICAL CENTER, Appellant, and Dr. L. Khademol Reza, Defendant.	)	Case No. 75, 446 cons. w/ Case No. 76,604 (Filed Sept. 15, 1992)

APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY, OKLAHOMA

HONORABLE ROBERT J. SCOTT, JUDGE

AFFIRMED ON CONDITION

W. Michael Hill,
Edward J. Main,
SECREST & HILL,
Oklahoma City, Oklahoma,

Reuben Davis,
Frederic N. Schneider, III,
William C. Kellough,
BOONE, SMITH, DAVIS,
HURST & DICKMAN,
Tulsa, Oklahoma, For Appellant,

W.C. Sellers, Jr.,
W.C. "BILL" SELLERS, INC.,
Oklahoma City, Oklahoma, For Appellee,

James L. Hall, Jr.,
Clyde A. Muchmore,
Harvey D. Ellis, Jr.,
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Oklahoma City, Oklahoma — For Amici Curiae VHA of Oklahoma, Inc., and American Hospital Association,

Page Dobson,
Ronald R. Hudson,
Elizabeth J. Dunning,
HOLLOWAY, DOBSON,
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Oklahoma City, Oklahoma, — For Amicus Curiae Oklahoma Hospital Association,

Andrew L. Frey,
Michael A. Vatis,
MAYER, BROWN & PLATT,
Washington, D.C.,

Fredric J. Entin,
James A. Henderson,
Margaret J. Hardy,
American Hospital Association,
Chicago, Illinois, — For Amicus Curiae American Hospital Association.

Memorandum Opinion by Robert L. Bailey, Presiding Judge:

In principal Case No. 75,446, Appellant Hillcrest Medical Center (Hospital) seeks review of judgment entered on jury verdict awarding $100,000.00 in actual damages and $10,000,000.00 in punitive damages to Appellee Ronda Scribner (Patient) in Patient's medical

negligence action. In consolidated Case No. 76,604, Hospital seeks review of the Trial Court's order denying Hospital's post-trial motion to vacate the judgment for punitive damages. In the principal appeal, Hospital alleges (1) failure of Patient's proof of causation, (2) error in instruction of the jury on the theory of res ipsa loquitur, (3) under several propositions, error in instruction and submission of the issue of punitive damages to the jury, and (4) excessiveness of the punitive damage award. In the consolidated action, Hospital asserts error of the Trial Court in denying Hospital's motion to vacate the punitive damage award, arguing unconstitutionality of Oklahoma's punitive damage statute, and again arguing excessiveness of the punitive damage award. Amici Curiae join in the attack on the award of punitive damages.

Patient underwent an apparently uncomplicated hysterectomy at Hospital under the surgical care of Defendant Dr. Reza on October 1, 1985, and Hospital placed Patient in Bed B of a semi-private room to recover. Hospital moved the patient occupying Bed A of the same room elsewhere in the facility in the early morning hours of October 2 but Hospital staff failed to note the move in its records.[1]

Later on the morning of October 2, within twenty-two hours of surgery, an orderly seeking the Bed A

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[1] Two shifts of nurses failed to note the move of the patient in the adjoining bed.

patient appeared at Patient's room[2] and announced his intention to take Patient to the ultrasound laboratory for testing. Patient protested that she had just come from surgery, had been instructed not to move without direction, and that she knew of no scheduled test. Nevertheless, the orderly persisted, and without checking Patient's identity,[3] the orderly lifted patient from her bed, Bed B, to place her in a wheelchair. Patient testified she then felt excruciating pain and nearly passed out. The orderly proceeded to take patient to the ultrasound lab.

At the ultrasound laboratory, technicians there noticed Patient's weakened condition and obvious pain. Notwithstanding, and without checking Patient's identity, the technicians commenced the ultrasound procedure by introduction of cold water through a catheter into Patient's bladder. Patient testified she experienced a wave of cramp-like pain as a result. At that point, upon further remonstrations by Patient, the laboratory technicians determined Patient's true identity, discontinued the ultrasound procedure, and returned Patient to her room. The technicians, however, failed to notify Patient's attending Nurse of the mistake.[4]

Patient discharged from Hospital about a week after surgery. However, two days later, Patient suffered an

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[2] Notwithstanding having treated the Bed A patient in her new room, nursing staff directed the orderly the Patient's room to find the Bed A patient.

[3] Patient wore a traditional hospital identification bracelet, and Patient's bed bore her name.

[4] Only after confrontation by patient's doctor was a notation of the mistake entered in Patient's records.

incisional dehiscence[5] and hernia, necessitating further surgery, although Patient apparently sustained little or no permanent impairment as a result of the second surgery.

At trial, Patient presented testimony of the orderly that he ignored Patient's protests, that he did not check Patient's identification before taking her to the ultrasound laboratory, and demonstrating the orderly's ignorance of hospital procedures for patient identification. Patient also presented expert testimony tending to show causation of the incisional dehiscence attributable to strain and pulling during patient's mistaken trip to the ultrasound laboratory. Patient also showed Hospital's net worth approaching $110,000,000.00

Hospital presented testimony of other experts contradicting Patient's evidence of causation. Defendant Dr. Reza testified that abdominal distension suffered by Patient during the initial hospitalization caused a suture to tear, resulting in the incisional dehiscence and hernia. Dr. Reza denied causal connection between the abandoned ultrasound procedure and the incisional dehiscence.

Based on the evidence, the Trial Court found Patient had clearly showed Hospital's "lackadaisical attitude" toward patient identification procedures, evincing "a reckless and wanton disregard of the rights of" Patient so as to potentially allow an award of punitive damages in

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[5] "A bursting open, splitting, or gaping along natural or sutured lines." Stedman's Medical Dictionary, 15th Ed. (Williams and Wilkens, 1990).

excess of actual damages determined.[6] The Trial Court then instructed the jury on the issue of punitive damages over objection of Hospital.

The jury retuned its verdict for Patient, awarding $100,000.00 in actual damages, and $10,000,000.00 in punitive damages. Hospital appealed judgment entered on jury verdict for patient in principal Case No. 75,446. Hospital subsequently moved to vacate the award of punitives, which the Trial Court denied. Hospital appealed the order denying the motion to vacate in Case No. 76,604, and the matters have been consolidated for resolution.

We address Hospital's attack on Patient's proof of causation first. On this issue, Hospital asserts incompetency of Patient's expert testimony attributing causation of the incisional dehiscence to the strain and movement of the mistaken trip to the ultrasound laboratory as unsupported in medical literature[7] and contrary to all other expert testimony offered at trial. By this argument, however, Hospital in essence urges this Court to re-weigh the evidence of patient's otherwise qualified experts,

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[6] 23 O.S. Supp. 1966 §9.

[7] See e.g., *Downs v. Longfellow Corp.*, 351 P.2d 999 (Okl. 1960) (weight of opinion no grater than reasons given in support thereof; opinion without rational basis has no probative force).

which we may not and will no do.[8] We therefore reject this allegation of error.

Next, Hospital attacks the award of punitive damages. In its first subproposition, Hospital argues the issue should not have been presented to the jury at all. In other words, while the conduct complained-of might be negligent, such conduct does not evince evil intent, the functional equivalent of such intent, or a conscious and knowing disregard of Patient's rights by Hospital so as to justify submission of the issue of punitive damages to the jury. In its related second subproposition, Hospital argues the complained-of conduct did not rise to the requisite level of culpability to justify lifting the punitive damages "cap" imposed by statute, that is, that the punitive damages award cannot exceed the amount of actual damages awarded.

An award of punitive damages is controlled by statute which provides:

> A. In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant, in an amount not exceeding the amount of

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[8] See, *Leeper v. Thornton*, 344 P.2d 1101 (Okl. 1959) (where expert allowed to testify as such, soundness of his opinions, conclusions and deductions go to weight of testimony, not admissibility, and weight accorded such testimony for determination of trier of fact).

> actual damages awarded. Provided, however, if at the conclusion of the evidence and prior to the submission of the case to the jury, the court shall find, on the record and out of the presence of the jury, that there is clear and convincing evidence that the defendant is guilty of conduct evincing a wanton or reckless disregard for the rights of another, oppression, fraud or malice, actual or presumed, then the jury may give damages for the sake of example, and by way of punishing defendant, and the percentage limitation on such damages set forth in this section shall not apply.
>
> B. The provisions of this section shall be strictly construed.

23 O.S. Supp. 1986 §9.

A party may be held liable for punitive damages under the "wanton or reckless disregard" standard if the party is shown to be "aware of, or culpably indifferent to, unnecessary risk of injury."[9]

In the instant case, Patient presented evidence showing Hospital's adoption of policies for patient identification, supporting at least an inference that Hospital recognized the risk of injury to patients due to misidentification. Patient also presented evidence clearly demonstrating ignorance of or failure to adhere to the patient identification policies by Hospital nurses, the orderly, and laboratory technicians. The Trial Court found Patient's evidence of Hospital's indifference to its own

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[9] *Thiry v. Armstrong World Industries*, 661 P.2d 515, 518 (Okl. 1983).

patient identification procedures clearly and convincingly[10] supported a finding of conduct equivalent to "reckless disregard for the rights of another" warranting both submission of the issue of punitive damages to the jury[11] and lifting the statutory "cap" on punitive damages. We agree with the Trial Court's assessment of the evidence and reject these allegations of error.

In its third subproposition attacking the punitive damages award, Hospital urges error in the Trial Court's instruction to the jury concerning punitive damages[12] as (1) impermissibly deviating from the punitive damage instruction prescribed by the Oklahoma Uniform Jury

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[10] "Clear and convincing" evidence is that which supports a conclusion free from serious or substantial doubt of correctness. Black's Law Dictionary (5th Ed. West. 1979).

[11] *Timmons v. Royal Globe Ins. Co.*, 653 P.2d 907, 918 (Okl. 1982) (person may commit such wilful acts in reckless disregard of another's rights that malice may be inferred). See also, e.g., *Mitchell v. Ford Motor Credit Co.*, 688 P.2d 42 (Okl. 1984) (reckless disregard); *Dilworth v. Fortier*, 405 P.2d 38 (Okl. 1965) (gross negligence or reckless disregard).

[12] The Trial Court's instruction provided:

> If you find a favor of [Patient] and grant her actual damages, and if you find the conduct of [Hospital] amounted to a wanton or reckless disregard for the rights of another, then you may, in addition to actual damages, grant exemplary damages in such sum as you reasonably believe will punish and be an example to others.
>
> Exemplary damages are not to be construed as compensation to the [Patient], but as a punishment to the Defendants, and as an example to others to deter them like conduct.

Instructions-Civil[13] and (2) lacking direction to the jury on Patient's "heightened" burden of proof of entitlement thereto. In this subproposition, Hospital asserts that the statutory mandate requiring the Trial Court to find "clear and convincing" evidence of sufficiently egregious conduct as a condition to lifting the punitive damages "cap" requires Patient to adduce "clear and convincing" evidence of such conduct to justify an award of punitive damages, and Hospital maintains the Trial Court erred in failing to so instruct. In a separate proposition, Hospital also attacks the Trial Court's instruction to the jury on the theory of res ipsa loquitur.

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[13] The Oklahoma Uniform Instruction on punitive damages provides:

> If you find in favor of Plaintiff (name), and grant him actual damages, and if you find the conduct of Defendant, (name), (was or amounted to):
>
> Fraud;
>
> Oppression;
>
> Gross negligence;
>
> Malice (actual or presumed);
>
> Evil intent;
>
> Reckless and wanton disregard of another's rights;
>
> as defined herein, then you may, in addition to actual damages, grant Plaintiff, (name), exemplary damages in such sum as you reasonably believe will punish Defendant, (name), and be an example to others.
>
> Exemplary damages are not to be construed as compensation to the Plaintiff, (name), but as punishment to the Defendant, (name), and as an example to others to deter them like conduct.
>
> In no event should the exemplary damages exceed ___.

OUJI-Civ. No. 5.5.

As to the Trial Court's instruction regarding punitive damages, we first note the Trial Court's instruction is nearly identical to the OUJI instruction, the Trial Court merely omitting non-applicable language from the OUJI version, and we find no error thereby. Second, Hospital did not request a "clear and convincing" instruction to be given, and Hospital's requested instruction[14] did not accurately state the law.[15] The punitive damage instruction given by the Trial Court appears otherwise free of fundamental error,[16] and we find no error as alleged in this proposition.

As to the Trial Court's instruction on res ipsa loquitur, we likewise find no error. Under that doctrine, negligence may be inferred from the mere happening of an accident upon a showing that (1) the injury-causing instrumentality was under the exclusive care and control of the defendant and (2) the event causing the injury was of a kind which does not ordinarily occur in the absence

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[14] Hospital's requested instruction on burden of proof for punitive damages directed that "punitive damages may be imposed only where the evidence plainly shows oppression, fraud, malice or gross negligence."

[15] *Timmons*, 653 P.2d at 914, 918 (where trial court instructs generally, and party desires more specific instruction, party has duty to request more specific instruction; "[i]f a requested instruction is objection[able] in any respect, refusal to so charge the jury with the instruction is not error."

[16] See e.g., *Croy v. Bacon Transport Co.*, 604 P.2d 137 (Okl. 1979).

of negligence.[17] As we view the record, we find presentation of some expert evidence by Patient attributing cause of Patient's incisional dehiscence and attendant second surgery to the stress and strain of the unnecessary trip to the ultrasound lab which would not have occurred if Hospital patient identification procedures had been followed. Even Hospital admits a mistake in this regard. Under these circumstances, we cannot say the Trial Court erred in giving a res ipsa loquitur instruction.

In its fourth subproposition of the principal appeal attacking the award of punitive damages, and again on appeal from the order denying Hospital's motion to vacate, Hospital challenges the constitutionality of the Oklahoma punitive damage statute, arguing the statute lacks a sufficient definition of both (1) culpable conduct and (2) limits of jury discretion on the amount of punitive damages allowable, in violation of Hospital's due process rights.[18] Under this proposition, Hospital asserts the due process guarantee protects against such "grossly excessive," "severe and oppressive" damage awards.

We find the United States Supreme Court has recently discussed this issue.[19] While not addressing the more general question of "whether 'undue jury discretion to award punitive damages' violates the due Process

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[17] 76 O.S. 1991 §21; *St. John's Hospital School of Nursing v. Chapman*, 434 P.2d 160 (Okl. 1967).

[18] U.S. Const., Amendment XIV; Okl. Const., Art. 2, §7.

[19] *Pacific Mutual Life Ins. Co. v. Haslip*, ___U.S.___, 111 S.Ct. 1032 (1991).

Clause of the Fourteenth Amendment,"[20] the Supreme Court found no due process violation in a punitive damage award under jury instruction in accord with Alabama law,[21] reasoning:

> So far as we have been able to determine, every state and federal court that has considered the question has ruled that the common-law method for assessing punitive damages does not in itself deny due process. (Citation omitted.) In view of this consistent history, we cannot say that the common-law method of assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional. . . . Nothing in the [Fourteenth] Amendment's text or history indicates an intention on the part of its drafters to overturn the prevailing method. (Citations omitted.)
>
> . . .
>
> . . . The instruction . . . enlightened the jury as to the punitive damages' nature and purpose [deterrence and retribution, valid state concerns], identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.
>
> These instructions . . . reasonably accommodated [defendant's] interest in rational decision making and [the state's] interest in meaningful individualized assessment of appropriate deterrence and retribution. The discretion allowed

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[20] *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1046 (Scalia, J. concurring in judgment).

[21] *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1044-1045.

> under [state] law in determining punitive damages is no greater than that pursued in many familiar areas of law as, for example, deciding "the best interests of the child," or "reasonable care," or "due diligence," or appropriate compensation for pain and suffering or mental anguish. (Footnote omitted.) As long as the discretion is exercised within reasonable constraints, due process is satisfied. (Citations omitted.)

Pacific Mutual Life Ins. Co., 111 S.Ct. at 1044.

As applied to the present case, we observe that the instruction given in *Pacific Mutual Life Ins. Co.* is nearly identical to that given in the instant case,[22] "enlighten[ing] the jury as to the punitive damages' nature and purpose, identif[ying] the damages as punishment for civil wrongdoing of the kind involved, and explain[ing] that their imposition was not compulsory."[23] Because the Oklahoma punitive damage statute specifically restricts such an award to cases of particularly egregious conduct for the purposes of punishment and deterrence and does not compel an award thereof in any certain case, under the U.S. Supreme Court's rationale we hold the Oklahoma punitive damage statute is not violative of Hospital's due process guarantees for lack of definition of culpable conduct or limits on jury discretion as alleged.

In related argument, Hospital also claims that Oklahoma law unconstitutionally lacks substantive standards

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[22] *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1037, footnote 1.

[23] *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1044.

of review for awards of punitive damages, both at the trial level and on appeal, also in violation of Hospital's due process rights. However, the U.S. Supreme Court tacitly rejected this allegation in *Pacific Mutual Life Ins. Co.*, holding only that:

> . . . [G]eneral concerns of *reasonableness and adequate guidance . . . to the jury* properly enter the constitutional calculus.

111 S.Ct. at 1043. (Emphasis added.)

Under this pronouncement, we discern no constitutional due process violation in the "grossly excessive" or "influenced by passion, prejudice or sympathy" standards of review for punitive damages employed in this state.[24] Application of both standards contemplate consideration of the *reasonableness* of the award in relation to, for example, (1) cause and extent of injury,[25] (2) the deterrence objective of punitive damages,[26] (3) the actual

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[24] See, e.g., *Buzzard v. Farmers Ins. Co., Inc.*, 824 P.2d 1105 (Okl. 1991); *Chandler v. Denton*, 741 P.2d 855 (Okl. 1987); *Timmoms*, 653 P.2d at 915.

But cf., *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1045, footnote 10.

[25] See, e.g., *Hobbs v. Watkins*, 481 P.2d 746 (Okl. 1970)

[26] See, e.g., *Buzzard*, 824 P.2d at 1116 ("[T]he large award of punitive damages was likely a result of 'an improper sympathetic response . . . larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated.' ")

damages awarded,[27] (4) net worth of the defendant,[28] and (5) the nature and egregiousness of defendant's conduct,[29] standards implicitly recognized as proper for consideration by the United States Supreme Court.[30] The Trial Court undertook a review of the punitive damage award under the same standards as this appellate court on Hospital's motion to vacate and, contrary to Hospital's allegations, we hold the standards of review applied meet due process safeguards.

Hospital also asserts invalidity of the award as contrary to the constitutional prohibitions of excessive fines.[31] As before, we find Hospital's allegation of violation of the excessive fine prohibition controlled by U.S. Supreme Court decision.[32] In that case, the Supreme Court held:

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[27] *Chandler*, 741 P.2d at 868 ("In light of the generously and amply compensated loss for Chandler's actual harm, we find the exemplary damages allowed by the jury not to be responsive to the purpose of civil punishment.")

[28] *Mitchell*, 688 P.2d at 46; *Thiry*, 661 P.2d at 518. See also *Basden v. Mills*, 472 P.2d 889 (Okl. 1970) (in absence of evidence of defendant's net worth, remittitur of punitive damages ordered).

[29] *Timmons*, 653 P.2d at 915 (Okl. 1982) (punitive damages held "partially the result of the combined impact of the several wrongful and willful acts of the defendants and combined effect of these items of evidence influenc[ing] the jury . . . [and] creat(ing) an improper sympathetic response of a damages award larger than reason dictates to be necessary to deter such conduct.")

[30] *Pacific Mutual Life Ins. Co.*, 111 S.Ct. at 1044.

[31] Okl. Const., Art. 11, §9. See also, U.S. Const., Amendment VIII.

[32] *Browning-Ferris Industries of Vermont v. Kelco Disposal*, 492 U.S. ___, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).

> . . . [T]he Excessive Fines Clause applies just to criminal cases. whatever the outer confines of the Clause's reach may be, we now decide . . . that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded. To hold otherwise, we believe, would be to ignore the purpose and concerns of the Amendment, as illuminated by its history.

Browning-Ferris Industries of Vermont, 109 S.Ct. at 2914.

The U.S. Supreme Court reasoned that the Constitutional drafters intended the Excessive Fines Clause to prohibit excessive payments to "a sovereign as punishment for some offense," and to "plac[e] limits on the powers of the new government."[33] Applying this reasoning to the instant case, and considering the identity of language in the Eighth Amendment to the U.S. Constitution and Art. II, §9 of the Oklahoma Constitution, we are similarly persuaded that the Oklahoma Constitutional drafters expressed the same intent to restrict the powers of state government, and did not propose by Art. II, §9 to limit damage awards in disputes between private individuals. We therefore find the Excessive Fines Clause of the Oklahoma Constitution inapplicable to this controversy.

In its fifth subproposition, Hospital alleges immunity from liability for punitive damages as a "not-for-profit," tax exempt corporation. However, and notwithstanding any tax exemption to which Hospital might be entitled

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[33] *Browning-Ferris Industries of Vermont*, 109 S.Ct. at 2915.

for its "charitable" works,[34] such corporations enjoy *no* immunity "from liability for torts by reason of any exemption accorded them."[35] We therefore reject Hospital's claim of immunity from punitive damages.

In a related argument advanced both in the principal and consolidated appeal, Hospital asserts improper argument of Patient and counsel inflaming the jury. By this argument, Hospital maintains Patient should not have been allowed to give an opening statement *pro se*. Hospital also claims Patient's counsel, throughout the trial, repetitively and improperly employed prejudicial remarks and argument to inflame the jury and inflate Patient's damages award.[36] However, we find no reversible error arising from Patient's *pro se* opening statement.[37] Nor do we find any reversible error arising from

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[34] 26 U.S.C.S. §501(c)(3) (Lawyer's Co-op, 1992).

[35] *Gable v. Salvation Army*, 186 Okl. 687, 100 P.2d 244 (Okl. 1940).

[36] Hospital variously complains that counsel improperly (1) "harped on the theme of [Hospital] as an unfeeling, impersonal corporation," (2) confused the jury with his imprecise "per diem" and other suggested mathematical means of calculating Patient's damages, (3) asked the jurors to "to identify [Patient] with the general community and . . . to place themselves in the position of (Patient)," and (4) interjected argument into the voir dire process.

[37] See, e.g., *Funnell v. Funnell*, 737 P.2d 105 (Okl. 1985); *Jefferson v. British American Oil Producing Co.*, 193 Okl. 599, 145 P.2d 387 (1944); *Rourke v. Myers*, 184 Okl. 46, 84 P.2d 639 (1938); *Oklahoma State Bank of Ada v. Mitchell*, 179 Okl. 567, 66 P.2d 920 (1937).

counsel's alleged prejudicial remarks,[38] to the vast majority of which Hospital failed to object at trial,[39] and we cannot say the remarks rise to the level of plain error as Hospital avers.[40] We therefore reject these allegations.

Hospital also claims improper consideration of Hospital's net worth leading to an inflated and excessive punitive damage award. In this allegation, Hospital argues "the verdict was excessive due to bias on the part of the jury because its members knew [Hospital] had a 'deep pocket.' "[41] However, Oklahoma law has consistently allowed consideration of a defendant's net worth for purposes of assessing punitive damages.[42]

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[38] Judgment will not be reversed for improper argument of counsel unless it is clearly shown that improper remarks influenced the verdict. See, e.g., *Middlebrook v. Imier, Tenny & Kugler, M.D.'s, Inc.*, 713 P.2d 572 (Okl. 1985); *Willis v. Fried*, 629 P.2d 1255 (Okl. 1981). See also, *Mikel Drilling Co. v. Dunkin*, 318 P.2d 435 (Okl. 1957) (clear showing of prejudice required for reversal); accord, *Beck v. Day*, 178 Okl. 310, 62 P.2d 1014 (1937).

[39] See, e.g., *Bane v. Anderson, Bryant & Co.*, 786 P.2d 1230 (Okl. 1989).

[40] 12 O.S. 1991 §2104(D).

[41] *Smith v. United States Gypsum Co.*, 612 P.2d 251, 255 (Okl. 1980).

[42] *Woods Petroleum Corp. v. Delhi Gas Pipeline Corp*, 700 P.2d 1023 (Okl.App. 1983); *Mitchell*, 688 P.2d at 46; *Thiry*, 661 P.2d at 518; *Smith*, 612 P.2d at 255; *Chowins v. Gypsy Oil Co.*, 185 Okl. 630, 95 P.2d 586 (1939); *Smith v. Autry*, 69 Okl. 28, 169 P. 623 (1918); *Willet v. Johnson*, 13 Okl. 563, 76 P. 174 (1904).
As Justice O'Connor has observed:

> . . . The 'Constitution does not require the States to subscribe to any particular economic theory.' *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92, 107 S.Ct. 1637, 1652, 95 L.Ed.2d 67. . . . Blackstone

In its last proposition, Hospital again complains of the size of the verdict for punitive damages as "clearly excessive" and "influenced by passion and prejudice." So, says Hospital, the punitive damages award must be reversed (or minimally) reduced by remittitur. On this issue, the Oklahoma Supreme Court has recognized:

> Punitive damages are allowed for the benefit of society as punishment. They are designed to provide a restraint upon the transgressor and to serve as a warning and example to the wrongdoer. (Footnote omitted.) A punitive damages verdict lies peculiarly within the province of the jury and it will not be casually interfered with on appeal when it is claimed to have been actuated by passion or prejudice. (Footnote omitted.) Unless the verdict appears to be *grossly excessive or the result of the jury's passion, prejudice or improper sympathy,* it will not be conditioned on remittitur. But *where an award is found so out of proportion as to be unconscionable, a conditional affirmance, subject to remittitur, may be required.*

Chandler, 741 P.2d at 868. (Emphasis added.)[43]

> remarked that the '*quantum*, in particular, of pecuniary fines neither can, nor ought to be, ascertained by any invariable law. The value of money itself changes from a thousand causes; and at all events, what is ruin to one man's fortune, may be a matter of indifference to another's.' 4 Blackstone Commentaries *371.

Browning-Ferris Industries of Vermont, 109 S.Ct. at 2933. And cf., *Basden,* 472 P.2d at 891, footnote 24, supra.

[43] See also, *Buzzard,* 824 P.2d at 1116; *Timmons,* 653 P.2d at 915.

The Oklahoma Supreme Court has directed remittitur in few cases under the "grossly excessive," "influenced by passion, prejudice or improper sympathy" standards. In *Chandler v. Denton*, the jury awarded $600,000 in actual damages and $500,000 in punitive damages. The Supreme Court directed remittitur of punitive damages in excess of $250,000, finding:

> . . . The $600,00 [actual damages] recovery . . . is . . . ample and generous. When the $500,000 punitive damages award is added to the other amounts recovered, the total verdict becomes so grossly excessive that we cannot in reason allow it to stand. In light of the generously and amply compensated loss for Chandler's actual harm, we find the exemplary damages allowed by the jury not to be responsive to the purpose of civil punishment.

Chandler, 741 P.2d at 868.

In *Buzzard v. Farmers Ins. Co., Inc.*, the jury awarded $200,000.00 in actual damages ("not an insignificant sum"[44]) for "distreess occasioned by withholding a $10,000.00 insurance payment," and $200,000.00 in punitive damages for bad-faith breach of the insurance contract. The Supreme Court directed remittitur of $1,600,000.00 in punitive damages, finding:

> [T]he large award of punitive damages was likely a result of 'an improper sympathetic response . . . larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated.'

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[44] 824 P.2d at 1116.

Buzzard, 824 P.2d at 1116.

In *Timmons v. Royal Globe Ins. Co.*, the jury awarded about $9,000 in actual damages, $25,000 for mental pain and suffering and $3,000,000 in punitive damages for breach of duty of fair dealing and good faith. In directing remittitur of $1,500,000.00 in punitive damages, the Supreme Court held:

> . . . [The] purpose [of an award of punitive] damages is to restrain the defendant and to deter other from the commission of similar wrongs. Upon review, such damages will not be held excessive unless it appears they are grossly so, or the result of passion, prejudice, or improper sympathy. It is the solemn and considered judgment of this Court that three million dollars awarded as punitive damages is partially the result of the combined impact of the several wrongful and willful acts of the defendants and that the combined effect of these items of evidence influenced the jury so as to create an improper sympathetic response of a damages award larger than reason dictates to be necessary to deter such conduct in this defendant and other similarly situated. Thus the award is held not to be properly responsive to the legitimate objective of a punitive damage award, ...

Timmons, 653 P.2d at 915.

Under the direction of these cases,[45] we have reviewed the evidence and argument of counsel at trial of

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[45] In *Timmons*, the Supreme Court expressed concern that the "combined impact of the [evidence] of the several wrongful . . . acts of the defendants . . . influenced the jury . . . to create

the instant matter. We are of the opinion that the $10,000,000.00 punitive damage award in the present case is "larger than reason dictates to be necessary to deter such conduct in this defendant and others similarly situated," is "not . . . properly responsive to the legitimate objective of a punitive damage award,"[46] and is "so . . . excessive that we cannot in reason allow it to stand."[47] We therefore hold the $10,000,000.00 award of punitive damages should be affirmed, conditioned on remittitur of $5,000,000.00 thereof. If Patient fails to file such remittitur, the entire judgment on jury verdict should be reversed, and the matter remanded for new trial.

The order of the Trial Court denying Hospital's motion to vacate and judgment entered on jury verdict is therefore AFFIRMED, conditioned on remittitur of punitive damages of $5,000,00.00 HANSEN, V.C.J. and HUNTER, J. concur.

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an improper sympathetic response of a damages award larger than reason dictates" in reaching a conclusion for remittitur. 653 P.2d at 915. In *Buzzard*, the Supreme Court expressed similar concerns in ordering remittitur. 824 P.2d at 1116. We are likewise concerned in the instant case that the "c mbined impact" of (1) the evidence of Hospital's indifference to the risk of injury to patients due to misidentification and (2) counsel's impassioned argument similarly "influenced the jury . . . to create an improper sympathetic response," and resulting in a "damage award larger than reason dictates."

[46] *Timmons*, 653 P.2d at 915.

[47] *Chandler*, 741 P.2d at 868.